

104
ATTORNEY ACCOUNTABILITY

Y 4. J 89/1: 104/9

Attorney Accountability, Serial No....

HEARINGS
BEFORE THE
SUBCOMMITTEE ON
COURTS AND INTELLECTUAL PROPERTY
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED FOURTH CONGRESS
FIRST SESSION

FEBRUARY 6 AND 10, 1995

Serial No. 9



OCT 19 1995

Printed for the use of the Committee on the Judiciary

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ATTORNEY ACCOUNTABILITY

MONDAY, FEBRUARY 6, 1995

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS AND
INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:32 a.m., in room 2237, Rayburn House Office Building, Hon. Carlos J. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives Carlos J. Moorhead, F. James Sensenbrenner, Jr., Howard Coble, Bob Goodlatte, Sonny Bono, George W. Gekas, Charles T. Canady, Martin R. Hoke, Patricia Schroeder, and Howard L. Berman.

Also present: Representative Melvin L. Watt.

Staff present: Thomas E. Mooney, chief counsel; Joseph V. Wolfe, counsel; Mitch Glazier, assistant counsel; Sheila Wood, secretary; Veronica Eligan, secretary; and Betty Wheeler, minority counsel.

OPENING STATEMENT OF CHAIRMAN MOORHEAD

Mr. MOORHEAD. The Subcommittee on Courts and Intellectual Property will come to order. Good morning and welcome to today's hearing.

At the outset, I would like to welcome those Members from both sides of the aisle who are new to the subcommittee. We don't have them all here yet today. Monday morning is kind of a tough time to get a full crowd here at any subcommittee because we don't vote on the floor until 5 o'clock this afternoon.

We welcome back those Members who have previously served. We are very, very fortunate to have as our ranking minority member of the subcommittee Mrs. Pat Schroeder, who has a long and distinguished record on the committee and in the Congress. While she didn't serve on this subcommittee last Congress, she served with distinction on this subcommittee in past Congresses and has always been a very valuable Member in our deliberations.

This morning is the first of 2 days of hearings focusing on the legal reform issues in H.R. 10, the Common Sense Legal Reforms Act of 1995. H.R. 10 is primarily a products liability and securities litigation reform proposal, neither of which represent subject matters that are within this subcommittee's jurisdiction.

Accordingly, H.R. 10 has not been referred to the subcommittee. Instead, it is being held at the full committee. Even though H.R. 10 is not pending before this subcommittee, there are four propos-

als in the bill that relate to this subcommittee's courts jurisdiction and which will be the subjects of our 2 days of hearings.

[The bill, H.R. 10, title I, sections 101, 102, 104, and 105, follows:]

I

104TH CONGRESS
1ST SESSION

H. R. 10

To reform the Federal civil justice system; to reform product liability law.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 4, 1995

Mr. HYDE, Mr. RAMSTAD, Mrs. CHENOWETH, and Mr. CONDIT (for themselves, Mr. ARMEY, Mr. ALLARD, Mr. BACHUS, Mr. BAKER of California, Mr. BAKER of Louisiana, Mr. BALLENGER, Mr. BARTLETT of Maryland, Mr. BARTON of Texas, Mr. BILIRAKIS, Mr. BLILEY, Mr. BLUTE, Mr. BONO, Mr. BUNNING of Kentucky, Mr. BURR, Mr. BURTON of Indiana, Mr. CALLAHAN, Mr. CALVERT, Mr. CAMP, Mr. CANADY, Mr. CHRISTENSEN, Mr. CHRYSLER, Mr. CLINGER, Mr. COBURN, Mr. COOLEY, Mr. COX, Mr. CRANE, Mrs. CUBIN, Mr. CUNNINGHAM, Mr. DAVIS, Mr. DOOLITTLE, Mr. DORNAN, Ms. DUNN, Mr. EMERSON, Mr. ENSIGN, Mr. EVERETT, Mr. EWING, Mr. FOLEY, Mr. FORBES, Mrs. FOWLER, Mr. FOX, Mr. FRISA, Mr. GANSKE, Mr. GILCHREST, Mr. GILMAN, Mr. GOODLATTE, Mr. GOODLING, Mr. GUNDERSON, Mr. HANCOCK, Mr. HASTERT, Mr. HASTINGS of Washington, Mr. HAYWORTH, Mr. HEINEMAN, Mr. HERGER, Mr. HILLEARY, Mr. HOBSON, Mr. HOSTETTLER, Mr. HOUGHTON, Mr. INGLIS of South Carolina, Mrs. JOHNSON of Connecticut, Mr. JONES, Mr. KIM, Mr. KNOLLENBERG, Mr. LAHOOD, Mr. LARGENT, Mr. LATOURETTE, Mr. LEWIS of Kentucky, Mr. LIGHTFOOT, Mr. LINDER, Mr. MCCOLLUM, Mr. MCHUGH, Mr. MCINTOSH, Mr. MICA, Mr. MILLER of Florida, Ms. MOLLINARI, Mrs. MYRICK, Mr. NUSSLE, Mr. PACKARD, Mr. PORTER, Mr. PORTMAN, Mr. RADANOVICH, Mr. RIGGS, Mr. ROHRABACHER, Mr. ROTH, Mr. ROYCE, Mr. SANFORD, Mr. SCHAEFER, Mr. SENSENBRENNER, Mr. SHADEGG, Mr. SHAW, Mr. SHAYS of Connecticut, Mr. SMITH of Texas, Mr. SMITH of New Jersey, Mr. SMITH of Michigan, Mr. SOLOMON, Mr. STEARNS, Mr. STOCKMAN, Mr. STUMP, Mr. TALENT, Mr. TATE, Mr. TAYLOR of North Carolina, Mr. TEJEDA, Mr. THORNBERRY, Mr. TIAHRT, Mr. UPTON, Mrs. WALDHOLTZ, Mr. WAMP, Mr. WELDON of Florida, Mr. ZIMMER, Mr. CRAPO, Mr. KOLBE, Mr. PAXON, Mr. YOUNG of Florida, Mr. COMBEST, Mr. EHRLICH, and Mrs. MEYERS of Kansas) introduced the following bill; which was referred as follows:

Title I, referred to the Committee on the Judiciary, and in addition to the Committee on Rules, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

Title II, referred to the Committee on Commerce, and in addition to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

JANUARY 19, 1995

Additional sponsors: Mr. SCHIFF, Mr. MOORHEAD, Mr. CREMEANS, Mr. NORWOOD, Mr. BONILLA, Mr. HUNTER, Mrs. VUCANOVICH, Mr. WALKER, Ms. EDDIE BERNICE JOHNSON of Texas, Mrs. SEASTRAND, and Mr. COLLINS of Georgia

A BILL

To reform the Federal civil justice system; to reform product liability law.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Common Sense Legal Reforms Act of 1995".

TITLE I—CIVIL JUSTICE REFORM

SEC. 101. AWARD OF ATTORNEY'S FEE TO PREVAILING PARTY IN FEDERAL CIVIL DIVERSITY LITIGATION.

(a) AWARD OF ATTORNEY'S FEE.—Section 1332 of title 28, United States Code, is amended by adding at the end the following:

"(e)(1) The district court that exercises jurisdiction in a civil action commenced under this section shall award

1 to the party that prevails with respect to a claim in such
2 action an attorney's fee determined in accordance with
3 paragraph (2).

4 “(2) An attorney's fee awarded under paragraph (1)
5 shall be a reasonable attorney's fee attributable to such
6 claim, except that the fee awarded under such paragraph
7 may not exceed—

8 “(A) the actual cost incurred by the
9 nonprevailing party for an attorney's fee payable to
10 an attorney for services in connection with such
11 claim; or

12 “(B) if no such cost was incurred by the
13 nonprevailing party due to a contingency fee agree-
14 ment, a reasonable cost that would have been in-
15 curred by the nonprevailing party for an attorney's
16 noncontingent fee payable to an attorney for services
17 in connection with such claim.

18 “(3) Notwithstanding paragraphs (1) and (2), the
19 court in its discretion may refuse to award, or may reduce
20 the amount awarded as, an attorney's fee under paragraph
21 (1) to the extent that the court finds special circumstances
22 that make an award of an attorney's fee determined in
23 accordance with such subparagraph unjust.”.

1 **SEC. 102. HONESTY IN EVIDENCE.**

2 (a) **OPINION TESTIMONY BY EXPERTS.**—Rule 702 of
3 the Federal Rules of Evidence is amended—

4 (1) by inserting “(a) **In general.**” before
5 “If”, and

6 (2) by adding at the end the following:

7 “(b) **Adequate basis for opinion.** Testimony in
8 the form of an opinion by a witness that is based on sci-
9 entific knowledge shall be inadmissible in evidence unless
10 the court determines that such opinion is—

11 “(1) based on scientifically valid reasoning; and

12 “(2) sufficiently reliable so that the probative
13 value of such evidence outweighs the dangers speci-
14 fied in rule 403.

15 “(c) **Disqualification.** Testimony by a witness
16 who is qualified as described in subsection (a) is inadmis-
17 sible in evidence if such witness is entitled to receive any
18 compensation contingent on the legal disposition of any
19 claim with respect to which such testimony is offered.”.

16 **SEC. 104. ATTORNEY ACCOUNTABILITY.**

17 (a) **TRUTH IN ATTORNEYS' FEES.**—It is the sense
18 of the Congress that each State should require, under pen-
19 alty of law, each attorney admitted to practice law in such
20 State to disclose in writing, to any client with whom such
21 attorney has entered into a contingency fee agreement—

22 (1) the actual services performed for such client
23 in connection with such agreement, and

12

1 (2) the precise number of hours actually ex-
2 pended by such attorney in the performance of such
3 services.

4 (b) AMENDMENT TO THE FEDERAL RULES OF CIVIL
5 PROCEDURE.—Rule 11(c) of the Federal Rules of Civil
6 Procedure (28 U.S.C. App.) is amended—

7 (1) in the matter preceding subdivision (1) by
8 striking “may” and inserting “shall”;

9 (2) in the penultimate sentence of subdivision
10 (1)(A) by striking “may” and inserting “shall”; and

11 (3) in subdivision (2)—

12 (A) by amending the first sentence to read
13 as follows: “A sanction imposed for a violation
14 of this rule shall be sufficient to deter repetition
15 of such conduct or comparable conduct by oth-
16 ers similarly situated, and to compensate the
17 parties that were injured by such conduct.”;
18 and

19 (B) in the second sentence by striking “,
20 if imposed on motion and warranted for effec-
21 tive deterrence,”.

22 **SEC. 105. NOTICE REQUIRED BEFORE COMMENCEMENT OF**
23 **CIVIL ACTION.**

24 Chapter 99 of title 28, United States Code is amend-
25 ed by adding at the end the following:

1 **§ 1632. Notice required before commencement of civil**
2 **action**

3 “(a) DISMISSAL OF CIVIL ACTION.—Except as pro-
4 vided in subsection (c), the district court in which a civil
5 action is commenced shall dismiss such action with respect
6 to a defendant, without prejudice, if—

7 “(1) not later than 60 days after such action is
8 commenced, the defendant files a motion to dismiss
9 such action on the basis that the plaintiff failed to
10 comply with the requirement specified in subsection
11 (b); and

12 “(2) the plaintiff fails to establish that before
13 commencing such action the plaintiff complied with
14 such requirement.

15 “(b) REQUIREMENT.—Not less than 30 days before
16 commencing a civil action in a district court of the United
17 States, the plaintiff shall transmit (by 1st class mail, post-
18 age prepaid, or contract for delivery by any company that
19 in its regular course of business physically delivers cor-
20 respondence as a commercial service to the public) to the
21 defendant (at an address reasonably calculated to provide
22 actual notice to such defendant) a written statement speci-
23 fying the particular claims alleged in such action and the
24 amount of damages claimed in such action.

25 “(c) EXCEPTIONS.—Subsection (a) shall not apply
26 with respect to any civil action—

1 “(1) to seize or forfeit assets subject to forfeit-
2 ure;

3 “(2) commenced under title 11 of the United
4 States Code;

5 “(3) commenced to establish a receivership or
6 conservatorship;

7 “(4) based on the insolvency of the defendant,
8 or the need to liquidate assets of the defendant to
9 satisfy any requirement under Federal law;

10 “(5) if assets that are subject to such action or
11 that would satisfy a judgment in such action are
12 likely to be removed, dissipated, or destroyed by the
13 defendant;

14 “(6) if the defendant is likely to flee;

15 “(7) if prior written notice of the filing of such
16 action is required by any other law;

17 “(8) to enforce a civil investigative demand or
18 an administrative summons;

19 “(9) if such action is—

20 “(A) to foreclose a lien;

21 “(B) to obtain a temporary restraining
22 order or preliminary injunction; or

23 “(C) to prevent the fraudulent conveyance
24 of property; or

1 “(10) if such action involves exigent cir-
2 cumstances that compel immediate resort to the
3 court.

4 “(d) STATUTE OF LIMITATIONS.—

5 “(1) SUSPENSION BEFORE COMMENCEMENT OF
6 ACTION.—If the statute of limitations applicable to
7 a claim would expire in the 30-day period beginning
8 on the date the plaintiff transmits the notice re-
9 quired by subsection (b), such statute shall be sus-
10 pended—

11 “(A) during such 30-day period; or

12 “(B) during the 90-day period beginning
13 on the date the plaintiff so transmits such no-
14 tice if, in such 30-day period, the parties to
15 such action so agree in writing.

16 “(2) FILING CIVIL ACTION AFTER DISMIS-
17 SAL.—If—

18 “(A) a civil action is timely commenced in
19 a district court with respect to a claim;

20 “(B) such action is dismissed under sub-
21 section (a); and

22 “(C) the statute of limitations applicable to
23 such claim expires before the expiration of the
24 60-day period beginning on the date such action
25 is dismissed;

1 then the plaintiff in such action may commence a
2 civil action based on such claim in such 60-day pe-
3 riod notwithstanding such statute.”.

4 (b) CONFORMING AMENDMENT.—Chapter 99 of title
5 28, United States Code, is amended in the table of sec-
6 tions by adding at the end the following:

“1632. Notice required before commencement of civil action.”.

Mr. MOORHEAD. Today, the subcommittee will focus on two of these four issues. The first is the proposal that the loser of a case pays the attorney's fees of the winner in diversity cases filed in Federal court.

The second proposal would amend rule 11 of the Federal Rules of Civil Procedure to restore the mandatory requirement for courts to sanction attorneys for improper actions and frivolous arguments intended to harass, unnecessarily delay or needlessly increase the costs of litigation. This provision also expresses the sense of Congress that States require, under penalty of law, that lawyers disclose to clients in contingency fee cases the actual duties performed for such clients and the precise number of hours actually expended in the performance of such duties.

In our second day of hearings on Friday, February 10, the subcommittee will explore two additional issues. They are an amendment to rule 702 of the Federal Rules of Evidence, which allows expert witnesses to testify as to their expert opinions with respect to scientific, technical or other specialized knowledge, and a requirement that not less than 30 days before commencing a civil action in a Federal district court the plaintiff deliver to the defendant a written statement specifying the particular claims alleged and the amount of damages claimed.

All four of these proposals are based on recommendations that were formulated in the 1991 session by former President Bush's Council on Competitiveness which was chaired by former Solicitor General Kenneth Starr. At that time, the Council concluded that: "In the past 30 years, our legal system has become burdened with excessive costs and long delays. Many features of the current legal system no longer serve to expedite justice or to ensure fair results. Instead, overuse and abuse of the legal system impose tremendous costs upon American society. Each year, the United States spends an estimated \$300 billion as an indirect cost of the civil justice system."

Since these recommendations were first made, the problems with America's civil justice system have only grown worse. Frivolous litigation as well as the mere threat of litigation is stifling innovation and product development at many U.S. companies. This situation impacts negatively on job growth, marketing of new products and America's international competitiveness.

For the average American, they are confronted with a civil justice system that is, in many instances, too costly, too protracted, and oftentimes seems to work better for the attorneys than for their clients.

The various proposals in H.R. 10, the Common Sense Legal Reforms Act of 1995, which is an important part of the Contract With America, represent a commitment to begin the process of making our civil justice system viable for all Americans.

Does the gentlelady from Colorado have an opening statement?

Mrs. SCHROEDER. I thank you, Mr. Chairman.

Let me briefly raise some questions that I have. I would ask unanimous consent to put my entire opening statement in the record. It is probably a lot more grammatically correct than I will be.

Mr. MOORHEAD. Without objection, so ordered.

Mrs. SCHROEDER. I want to thank you for your kindnesses and courtesies in planning this week's hearing, but I just wanted to state early on some of the concerns I have as we look at the English rule and the proposed rule 11 modification.

I find with respect to the English rule that everybody is now touting, it is very interesting that in England they are now talking about abandoning it. In fact, the Economist, which is a conservative British magazine, just had a recent editorial that said it was important to do away with it because they found that only the wealthy could afford the risk of litigation, and that offends one of the most basic principles of a free society, equality before the law.

The English rule fails to distinguish between frivolous cases and a larger class of cases, and that is the class of cases in which it is very hard to decide whether you should proceed with litigation or not. It is a close call. And if you have people who have a close-call case, the fact that they might have to pay if they lose might be the issue that causes them not pursue it. So how do you define a frivolous case versus the closer calls?

I also think there are some risk-averse litigants. If you take major corporations, they can treat this as just a cost of doing business or figure out some way that they would not feel held back from proceeding to sue. Whereas, for many people who did not have a way of passing it on, the effect is very different.

I continue to want to know what the empirical evidence is that this English rule would discourage frivolous claims. Nobody wants frivolous claims, but one of the questions is, what has caused this so-called litigation explosion? Is it frivolous tort cases or is it commercial litigation between institutional parties? And, if so, how would the English rule stop that? Or what is it and how do we address that?

I also think that the adoption of the English rule could cause another layer of litigation following the final determination. There could be another litigation to determine what are reasonable fees, who is entitled to them and so forth.

The English rule proposed in H.R. 10 with respect to diversity cases poses some new and interesting things for the United States and its Federal system. My question is, will this then encourage a shift of cases to State courts rather than diverting them altogether? Because while we say the States are laboratories, as you know, very few States have adopted this. And, in fact, in Florida—it is very interesting that the doctors in Florida insisted on having this, and then the doctors in Florida 5 years later insisted on doing away with the English rule because they found it didn't get them where they wanted to go.

So those are some very serious concerns I have, Mr. Chairman. And I have an equal number of issues that I would like to know about when we talk about changes to rule 11, but I will be anxious to listen to the witnesses, and I thank you again.

Mr. MOORHEAD. Well, thank you very much.

[The prepared statement of Mrs. Schroeder follows:]

PREPARED STATEMENT OF HON. PATRICIA SCHROEDER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Thank you, Mr. Chairman. I want to express my particular thanks to you for all your courtesies in planning this week's hearings. I must say, however, that the sub-

ject matter of these hearings is very troubling to me, because we appear to me to be embarking on so-called reforms that have a great, catchy name, but behind that name, the possibility of tremendous harm lurks for the ordinary citizen. I hope we will have an opportunity today to explore those risks fully, with respect to the English Rule and proposed Rule 11 modifications.

It is interesting that just as we are taking up the question of the English rule, notable voices in England are calling for the abandonment of that rule in England. For example, *The Economist*, a conservative British magazine, called for the abandonment of the rule on January 14, and its reasoning goes right to the heart of my own concerns. *The Economist* said that because of the English rule, "only the very wealthy can afford the costs and risks of most litigation. That offends one of the most basic principles of a free society: equality before the law."

It is critical that we explore whether the English rule would result in effectively shutting off access to the courts for everyone except the very wealthy (or, perhaps, the permanently judgment-proof individual).

It is very troubling to me that the English rule does not distinguish between frivolous cases and what I believe to be a much larger class of cases, which is those cases that are objectively reasonable to litigate, but for which it is impossible to predict accurately at the outset what the outcome will be. If we adopt a rule that requires the loser of closely contested cases to pay the winner's attorney's fees, it is clear to me that we are going to effectively shut the courthouse door to the plaintiffs in those cases.

I am also very concerned that the proposed rule would have very different effects on "risk-averse" litigants and on "risk neutral" litigants. Middle-class plaintiffs who are one-time litigants will find the proposed rule to be a significant deterrent to the courthouse, even in cases that are objectively meritorious, because it is too high a risk for them to assume even a relatively small chance that they will have to pay their opponent's legal fees. Institutional parties who are frequent litigants, on the other hand, will be able to adjust to the proposed rule as a cost of doing business, and the primary impact of the English rule on them will be to greatly enhance their negotiating position when they are in litigation against non-institutional, risk-averse parties. This disparate impact weighs heavily against the average citizen.

What is the empirical evidence that the English rule would discourage frivolous claims without discouraging legitimate claims by risk-averse parties? If it is true that any so-called litigation explosion is accounted for primarily by commercial litigation between institutional parties, what is the evidence that the English rule would affect filings in those cases without inappropriately discouraging average citizens from pursuing their claims?

Another significant issue is whether we are burdening the courts by ensuring that every litigated case will involve a second round of litigation over the question of attorney's fees, including complicated questions as to who prevailed on each claim, and what the fee award should be.

The particular form of the English rule proposed in H.R. 10, with respect to diversity cases, poses some particular anomalies that we also must explore. For example: If the purported justification for adopting the English rule is to discourage "frivolous" cases, how is that justification served by an English rule in diversity cases, which at best will shift cases to the state courts, rather than deterring them altogether?

We often talk about the states as laboratories in which experiments can be conducted as to what systems or programs work best. It is notable that the states have not, in any significant numbers, perceived the English rule to be an appropriate measure for their tort litigation. The Florida experience, in which doctors first demanded the English rule, and then demanded that it be abolished, should be instructive to us.

These are just some of the serious concerns that are raised by the English rule, and there are an equal number of issues that relate to the proposed changes to Rule 11.

So I join our Chairman in welcoming today's witnesses in the hope that we will be able to get at the heart of these troubling questions and assess the implications of these proposals.

Mr. MOORHEAD. I would also like to tell the witnesses here and anybody that is interested, I know there are several positions that can be taken on each one of these issues—one that is opposed to any of the changes; two, that they accept the changes as they are; and the third possibility would be that they recommend things that

might be in the legislation that would make loser-pays or any of the other things work better.

I would be very much interested in any comments that anybody connected with the law has to make on the subjects. And I would ask you if you have those recommendations to send them to our counsel, Tom Mooney, who is our chief of staff for this subcommittee.

I would like now to welcome two of our distinguished colleagues to the subcommittee: the Honorable Jim Ramstad from the 3d District of Minnesota and the Honorable Christopher Cox from the 47th District of California.

Up until this Congress, Congressman Ramstad was a valued member of the Judiciary Committee. He is now serving on the Ways and Means Committee, and I look forward to working with him not only on this issue but intellectual property and trade issues as well, given that he is a member of the Ways and Means Trade Subcommittee.

Congressman Cox, who is a fellow member of the California delegation, is the chairman of the Republican Policy Committee and a highly valued Member of the House. He, along with Congressman Ramstad, has been instrumental in the drafting of H.R. 10, the Common Sense Legal Reforms Act of 1995. And you are both to be commended for the efforts that you have made.

We have your statements which I ask unanimous consent to be made a part of the record, and I ask that you briefly summarize your statements. In the interest of your time and that of the subcommittee's, it is the Chair's intention to then proceed directly to our next panel of witnesses.

STATEMENT OF HON. JIM RAMSTAD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MINNESOTA

Mr. RAMSTAD. Thank you very much, Mr. Chairman. It is a true pleasure to see you sitting there and refer to you as chairman, and I appreciate being invited here today.

I chaired the GOP task force of 10 members who drafted the bill before us today. H.R. 10, the Common Sense Legal Reforms Act, is one of the 10 bills comprising our Contract With America. Certainly no member of the task force contributed more than my colleague from California, sitting next to me. Representative Cox not only wrote the entire second title of the bill that deals with securities reform, but he also provided valuable input on the provisions that are the subject of today's hearing.

Mr. Chairman, I just want to say that this is, in many ways, a truly historic day. We are actually having a hearing on tort reform in the Congress of the United States. And it is gratifying these proposals are finally getting a hearing, and I commend your leadership.

We don't need to tell the average American that our legal system is a mess. Today's system no longer serves to expedite justice and ensure fair results. Our system has become burdened with excessive costs and unconscionable delays. Overuse and abuse of the legal system impose tremendous costs upon American taxpayers, businesses and consumers.

In 1992 alone, Mr. Chairman, some 20 million civil lawsuits were filed in State and Federal courts. That is one lawsuit for every 10 adults in America.

And I just want to point out by way of background, Mr. Chairman and members of the subcommittee, some material I think is very, very important. There was a study done 3 years ago by a very prominent actuarial consulting firm, Tillinghast, and the firm estimated that the direct cost of the tort system in 1991 was \$132 billion. Now, to put this figure in perspective, \$132 billion represents 60 percent of what our Nation spent the same year on public education. Very, very sobering figure, Mr. Chairman, representing two and a half times what our Nation spent the same year on police and fire.

So, again, I think we need to put the reforms that we are bringing to this subcommittee today into perspective.

The same study shows that between 1933 and 1991 tort cases in this country rose by a factor of 400. By contrast, our GNP grew only a hundredfold over the same period. So tort costs have grown four times faster than the U.S. economy.

And, of course, we all know about the \$300 billion in indirect costs of the civil justice system, the abuse in our legal system, the excesses that are hurting our international competitiveness. A 1994 Business Roundtable survey of 20 major corporations reveals that these corporations receive 45 percent of their revenues from outside the United States and 55 percent from inside the country. Yet 88 percent of their total legal costs are spent inside this country.

Deserving claimants are being hurt by excessive delay in getting their cases heard in court. In 1985, the percent of civil cases over 3 years old in Federal district court was 6 percent. Five years later, that figure—in other words, the percent of civil cases over 3 years old in Federal court—was over 10 percent.

We have all heard about the abusive and frivolous lawsuits—the McDonald's coffee case, the California adolescent suing over losing a spelling bee. We have all heard from countless small business owners whose livelihoods are in jeopardy because of the mere threat of litigation.

I just received a letter from the owner of a bike and ski shop who said she could no longer afford offering country ski lessons because the insurance costs exceed her expected revenues by five times.

Mr. Chairman, enough is enough. This bill, H.R. 10, provides concrete steps to restore efficiency, accountability and fairness to our Federal civil justice system.

I want to quote from the Washington Post editorial of December 16 because I think they state very succinctly what is needed. They say the underlying problem with the tort system is not the occasional and often temporary multimillion-dollar windfall—and we agree with that—but the impact of uncertain liability on some segments of society including industry, medicine and research. This reform is a task worth tackling. That is the Washington Post.

Mr. Chairman, this bill provides concrete steps. And certainly the two provisions before the subcommittee today would restore accountability and fairness to our Federal civil justice system.

Now, I am not going to touch on the uniform national product liability laws, which are called for in H.R. 10, because I know that

they are before, as the chairman mentioned, a different committee. But I just want to emphasize that we need to deal with punitive damages. We need to place reasonable limitations on punitive damages. And I cannot help but again refer to the Washington Post editorial when they said that a cap on punitive damages is very appropriate and long overdue.

Mr. Chairman, in getting to the primary issue at hand today, which the distinguished ranking member mentioned as well, in order to discourage frivolous lawsuits and promote settlement of meritorious cases we have adopted a modified version of the English rule. Losing parties would pay no more than they spent on their own attorney, and courts would have discretion in limiting awards under special circumstances.

Now, to answer the questions raised by the distinguished ranking member, we only restrict when this loser-pays provision can be used. We not only restrict it, but we also allow flexibility. Let me explain.

First of all, plaintiffs have the option to benefit from the fairness rule as we crafted the bill. It only applies to cases brought in Federal court. The operative language is "commenced" in Federal court. So it would not apply if the defendant removed the case to Federal court. If the plaintiff does not want to be subject to the fairness rule, he or she is free to file in State court where the Federal rule would not apply.

The second limitation—and, hence, the modified English rule—we do provide flexibility in application. Judicial discretion is provided to avoid any unjust result. Judges may reduce or even refuse to award attorneys' fees in circumstances where the end result would be unjust.

Second, we provide the losing party will pay no more, as I said, to the prevailing side attorney than it paid to its own attorneys. So there are modifications on this rule, and we believe the bottom line would be twofold: to discourage frivolous lawsuits, make a person think twice before filing a frivolous claim; and, secondly, to promote—to facilitate settlement of meritorious claims.

Our bill also, Mr. Chairman, reforms rule 702 of the Federal Rules of Evidence so that expert testimony is not admissible unless based on scientifically valid reasoning. What we are trying to do here is merely codify the *Daubert* case to exclude junk science.

Also, expert testimony would not be admissible if the expert is paid a contingency fee so as to remove incentives for biased testimony. We are trying to eliminate these hired guns who are paid as so-called expert witnesses on a contingency basis. And, believe me, they do not let any expertise get in the way of their biases. And we want to get back to expert testimony based on scientifically valid claims.

The next element is to promote pretrial settlement. The bill requires plaintiffs to transmit written notice to the defendant at least 30 days before filing a suit specifying the claims involved and the actual amount of damages sought.

Attorneys also—the fourth element of the bill, Mr. Chairman—need to be more accountable to their clients. Hence, we have a full disclosure requirement of duties actually performed and hours ac-

tually worked in contingency-fee cases. I know a lot of trial lawyers are apoplectic about this provision.

This is merely a sense of Congress resolution. There were those who wanted to eliminate contingency fees altogether. But, as one who believes strongly in the free marketplace, we prevailed and didn't provide that in the bill.

Now the rule 11 provision, the next element of the bill, what we are trying to do here in reforming rule 11 of the Federal Rules of Civil Procedure, Mr. Chairman, is to restore the mandatory requirement for courts to sanction attorneys for improper actions and frivolous arguments intended to harass, unnecessarily delay and needlessly increase the cost of litigation. Also, it expands of the purpose of sanctions to include compensation of the injured party for its attorneys' fees.

Mr. Chairman, there is only one other provision that I have not touched on, and I just want to conclude my testimony by mentioning it.

We provide a legislative checklist requirement. We feel that not only do attorneys need to be accountable but legislators, Members of Congress, need to as well. And when reporting bills to the House floor, committee reports under this provision must be in clear language.

And I know one of the members of the subcommittee who is not here today, the distinguished gentleman from California, Mr. Bono, like many Americans, is very upset with the overuse of legalese so that the average man and woman has trouble understanding and reading some of the requirements imposed upon them.

But what we want to do in clear language is provide knowledge and information as to the following issues: preemption of State law, retroactive liability or applicability, authorization of private suits and the applicability of the legislation to the Federal Government.

I don't think that legislative checklist, Mr. Chairman, is too much to ask of the Members and staff to benefit the general public and cut down on some of the unnecessary costs imposed upon them by the overuse of legalese.

In conclusion, Mr. Chairman, I wish you and the committee well as you complete your work on this historic part of the Contract With America. Tort reform is needed. And it is refreshing to see a consensus emerging when even the Washington Post and some of the other publications, which could not be accused of trying to facilitate passage of the Contract With America, are talking favorably about which of the elements. I think the day for reforming our civil justice system is at hand, and I deeply appreciate the opportunity to lead off the hearing today.

Thank you, Mr. Chairman.

Mr. MOORHEAD. Thank you very much for your testimony.

[The prepared statement of Mr. Ramstad follows:]

PREPARED STATEMENT OF HON. JIM RAMSTAD, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF MINNESOTA

Mr. Chairman, as a former member of this committee, it's a great pleasure to see you sitting there and address you as "Chairman." Thank you for inviting me to be here today.

As you know, I chaired the GOP task force of ten members who drafted the bill before us today, the "Common Sense Legal Reforms Act," which is one of the ten

bills comprising our "Contract with America." No member of the task force contributed more time and effort than my colleague from California sitting next to me. Representative Cox not only contributed the entire second title of the bill, which he's been shepherding through the Commerce Committee, but he also provided valuable input on the provisions that are the subject of today's hearing.

It can be said that this is truly an historic day, Mr. Chairman, as the House Judiciary Committee is actually holding a legislative hearing on tort reform. It's gratifying that these proposals are finally being heard, and I commend your leadership.

We don't need to tell the average American that our legal system is a mess. Today's legal system no longer serves to expedite justice and ensure fair results. Our legal system has become burdened with excessive costs and long delays. Overuse and abuse of the legal system impose tremendous costs upon American taxpayers, businesses and consumers.

In 1992 alone, some 20 million civil lawsuits were filed in state and federal courts—that's one lawsuit for every ten adults in America.

A 1991 study by Tillinghast, a prominent actuarial consulting firm, estimated the direct cost of the tort system at \$132 billion in 1991. To put this figure in perspective, \$132 billion represents 60% of what this country spent in 1991 on public education and 2½ times what the nation spent in 1991 on police and fire protection.

Tillinghast found that between 1933 and 1991, U.S. tort cases rose by a factor of almost 400. By contrast, GNP grew only one-hundredfold over the same period. Thus, tort costs have grown almost four times faster than the U.S. economy.

Again, the \$132 billion figure represents only direct costs of the tort system. The Tillinghast study did not include the plaintiff's legal fees and cost for suits that are not won; federal and state court costs; the amount of any recoveries over insurance coverage limits; and indirect costs such as the value of time lost. Another study estimates the U.S. spends \$300 billion in "indirect costs" of the civil justice system.

These tremendous figures might be easier to swallow if most of the dollars went to compensate injured parties, but our system is highly inefficient. According to studies by both Rand Corporation and Tillinghast, only about 50 cents of the liability dollar goes to injured claimants.

The abuse in our legal system is hurting our international competitiveness. A 1994 Business Round table survey of 20 major U.S. corporations reveals that these corporations receive 45% of their revenues from outside the U.S. and 55% from inside the U.S., yet 88% of their total legal costs are spent inside the U.S.

Deserving claimants are also hurt by excessive delay in getting their cases heard in court. In 1985, the percent of civil cases over three years old in Federal District Courts was 6.6%. Five years later that figure grew to 10.4%.

All of us have heard about the abusive and frivolous lawsuits. The McDonald's coffee case. The California adolescent upset about losing a spelling bee. He sued the sponsors of the spelling bee for compensatory and punitive damages on grounds of breach of contract, breach of an implied covenant of good faith and fair dealing, and of course, the intentional and negligent infliction of emotional distress!

I've heard from countless small business owners whose very livelihoods are in jeopardy because of the mere threat of lawsuits. An owner of a bike and ski shop wrote recently that she can no longer offer cross-country ski lessons because the insurance costs would exceed her expected revenue five times over! (By the way, the owner has conducted ski lessons for 20 years and never had an accident or injury.)

Enough is enough. Our "Common Sense Legal Reforms Act," H.R. 10, provides concrete steps to restore efficiency, accountability and fairness to our federal civil justice system.

As the *Washington Post's* editorial board pointed out on December 16, "The underlying problem with the tort system is not the occasional, and often temporary, multi-million-dollar windfall but the impact of uncertain liability on some segments of society, including industry, medicine and research. This reform is a task worth tackling."

Mr. Chairman, H.R. 10, the "Common Sense Legal Reforms Act," provides concrete steps to restore accountability, efficiency and fairness to our federal civil justice system. Our bill establishes uniform, national product liability laws in three areas: punitive damages; joint and several liability; and product seller liability.

While I understand the liability provisions of H.R. 10 will be discussed at the full committee level, I do want to comment that even the *Washington Post* agrees that "Caps on punitive damages make sense."

Our bill does not eliminate punitive damages, as some would prefer, but merely imposes reasonable limits on grotesquely bloated punitive damages awards that no longer bear a rational relation to the defendant's culpability or society's larger interests.

Also, the bill does not eliminate joint and several liability, as we believe wrongly injured parties should have their medical bills and lost wages paid. However, with regard to non-economic damages, parties would be liable for only their proportion of responsibility. This is an area where gross unfairness can occur, and it just makes "common sense" to institute reasonable reforms.

In order to discourage frivolous lawsuits and promote settlement of meritorious cases, H.R. 10 also adopts a modified version of the English Rule, which holds the loser accountable for the attorneys' fees of the prevailing party. Losing parties would pay no more than they spent on their own attorneys, and courts could limit awards under special circumstances.

In addition, H.R. 10 reforms Rule 702 of the Federal Rules of Evidence so that expert testimony is not admissible unless based on scientifically valid reasoning, per the Supreme Court's 1993 *Daubert* case, to exclude "junk science."

Also, expert testimony is not admissible if the expert is paid a contingency fee, so as to remove incentives for biased testimony.

To promote pre-trial settlement, H.R. 10 requires the plaintiff to transmit written notice to the defendant at least 30 days before filing a suit specifying the claims involved and the actual amount of damages sought.

Attorneys also need to be more accountable to their clients. Hence, our "full disclosure" requirement of duties actually performed and hours actually worked in contingency fee cases.

The bill further reforms Rule 11 of the Federal Rules of Civil Procedure to restore the mandatory requirement for courts to sanction attorneys for improper actions and frivolous arguments intended to harass, unnecessarily delay and needlessly increase the costs of litigation. And it expands the purpose of such sanctions to include compensation of the injured party for its attorney's fees.

Finally, our bill contains a "legislative checklist" requirement. When reporting bills to the House floor, committee reports must specify, in clear language, how the legislation addresses the following issues: preemption of state law, retroactive applicability, authorization of private suits and the applicability of the legislation to the federal government.

In conclusion, Mr. Chairman, I wish you and the committee well as you complete your work on this important part of the "Contract with America" and deeply appreciate the opportunity to testify today.

Mr. MOORHEAD. Congressman Cox.

STATEMENT OF HON. CHRISTOPHER COX, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. COX. Thank you, Mr. Chairman, and thank you all for being here for this very important hearing on H.R. 10.

It is worth spending a moment to remind ourselves why it is that we are here, why this was part of the Contract With America.

Public opinion surveys show that as poor as President Clinton's approval ratings are, as poor as are the approval ratings for the Congress, the civil justice system fares worst of all. Almost no one in America thinks that our current legal system works.

Given the facts, this should come as no surprise. There are 260 million people in America, and each year there is enough litigation for each of them to be a plaintiff and a defendant in his or her own lawsuit. In 1990, there were over 100 million lawsuits filed in State courts alone.

Is this too much litigation? Believe it or not, some lawyers say no. On the other hand, America represents a tiny fraction of the world's population, but we have the vast majority of the world's lawyers. Our Nation now has more than twice as many lawyers as it did just 20 years ago.

If all of America's lawyers were physically to attend the American Bar Association convention it would have to be held simultaneously in the Astrodome, the Super Dome, the Metro Dome, the L.A. Coliseum, RFK Stadium, Wrigley Field, Dodger Stadium, Can-

dlestick Park, the Rose Bowl, the Cotton Bowl and the Orange Bowl.

In my home State of California in 1987, just a few years ago, there were 107,000 lawyers. In the next 5 years, while businesses and providers were leaving California, the State gained 28,000 lawyers, an increase of more than 26 percent.

And as fast as their numbers have been growing, legal fees have been growing faster still. In 1992, California lawyers took in \$16 billion in fees. That was a 57-percent increase in the same 5-year period.

Needless to say, not all of these lawsuits and all of these legal fees are socially beneficial. In a recent issue of Newsweek, columnist Robert J. Samuelson had this to say:

"Lawyers," he wrote, "have an economic interest in cultivating and prolonging conflict. This means they are fundamentally at odds with the purposes of the legal system. Courts and lawyers exist only to explain and enforce the rules society sets for itself and to settle disputes arising from these rules. The trouble is that lawyers' well-being runs in the opposite direct. The more conflict, the better. The more cumbersome and ambiguous society's rules, the better."

Ambiguous, cumbersome, unpredictable, burdensome and expensive. That, unfortunately, describes today's civil justice system. It is a system that many people believe merits not the maxim "equal justice under law," but, rather, the admonition from Dante's *Inferno*: "Abandon hope, all ye who enter here."

One tragic result is that our country is fast becoming a nation of victims. Individual responsibility for the consequences of ordinary living is becoming a lost virtue. It seems as if no injury, real or imagined, can occur without its own lawyer and its own lawsuit. These days, even a spilled cup of hot coffee in a woman's lap in a moving car can be worth more than half a million dollars if only you are willing to sue. Our system of justice is, in fact, a great legal wheel of fortune.

Unfortunately, unlike the TV game show, our legal system inflicts serious injury on many of its unwilling contestants. In an age when damages are routinely awarded not just for real injuries like the cost of fixing a broken car or lost wages but also millions more for pain and suffering and emotional distress, it is ironic that the one kind of serious injury that can occur without any kind of remedy is injury inflicted by lawyers themselves.

Just as Congress for so long exempted itself from the laws that applied to every American, the legal system is exempt from any responsibility for the pain and suffering, the emotional distress, and the damage and lost wages and lost jobs that it causes.

The filing of a lawsuit doesn't tell us anything about who is right or wrong, but it does give enormous power to the person who files it. Simply by filing a lawsuit any person and his or her lawyer can take depositions of every worker in a company. They can turn your home or office upside down and require you to produce thousands of documents. They can force to you spends hundreds of thousands of dollars in legal fees.

And if you, hapless victim of a baseless lawsuit, decide to fight to prove you are right and if you pay your own legal fees all the

way to the end of the lawsuit, what happens when you are completely vindicated? What is your remedy at law for this injury? Nothing. Absolutely nothing. That is our current system.

It is a tragic and absurd result from a system that presumes to go by the name of justice. But it is the necessary product of our unique winner-pays system. Almost everywhere else in the world if you win your case you are made whole. Yet in our system, strangely, the loser doesn't have to pay. So even if you win, you lose.

Indeed, the only sure winners in today's legal system—today's legal lotto—are the lawyers. No wonder a majority of Americans, according to a survey published January 30, 1995, in U.S. News & World Report, think lawyers simply use the system to make themselves rich.

Something must be done to stop the virulent spread of such abusive and wasteful litigation. That is why the central element of the Common Sense Legal Reform Act is the full recovery rule. It is what Jim Ramstad just referred to as the fairness rule. It is also known as the loser-pays rule, or the English rule, or the everywhere-but-America rule.

Under the full recovery rule, if you win your case, you win. The full recovery rule is a necessary part of the cure to America's lawsuit epidemic. It expedites the resolution of strong cases and deters the filing of frivolous ones. To see why let me give you two examples.

In the first case, let's say you are sued for \$100. The plaintiff's case is weak, but defending it will cost you \$20. So you think that even if you go to court and win you will lose 20 bucks. Under the current winner-pays system, there is a powerful incentive for you to settle for \$19.99 and get the whole thing over with. In this way, the present system encourages the filing of nuisance suits designed to extort so-called settlements.

The full recovery rule, on the other hand, would discourage the filing of this particular lawsuit. Under the full recovery rule you might be willing to pursue your case because you will come out better if you win. The loser will have to pay your attorney's fees as well as the damages that he is responsible for causing.

Most important of all, by eliminating the chance for legal extortion, the chances are this weak case wouldn't be filed in the first place.

Now, let's take the opposite scenario. You sue Hazard Industries for \$100. Your case is strong, and the defendant knows it. Under the current system, Hazard Industries is tempted to stretch out this case for years, increasing your costs in order to force a smaller settlement for, say, \$50.

This needless delay clogs up our legal system and results in you, the injured party, receiving less than the amount to which you should be entitled. The full recovery rule would encourage the speedy resolution of your meritorious case with a higher reward for your injury. If Hazard Industries stretched out the litigation to delay the inevitable result, it would have to pay both a higher award and your attorney's fees.

The goal of our civil justice system should be to restore the prevailing litigant to the same position he or she would have had if

the challenged action or losing lawsuit had never occurred. But under the current system neither plaintiffs nor defendants have that opportunity. But the full recovery rule in the Common Sense Legal Reform Act will guarantee that the winner in a lawsuit actually wins.

One final point. The full recovery rule in title I of the Common Sense Legal Reform Act is purposely designed to advantage plaintiffs with good cases. By adopting the rule only in diversity cases, we will always be giving plaintiffs the opportunity to decide for themselves whether they wish to use it or not. Diversity cases can always be brought in State court on precisely the same grounds and the same law.

Under the current winner-pays system, plaintiffs and their lawyers cannot choose the option of full recovery. Full recovery is unavailable in either State or Federal court. But if this bill is enacted, plaintiffs will, for the first time, have an option of choosing the full recovery rule.

This question of expanded options is a critical one. If I am a plaintiff and I believe my case is strong, I can file even my State claims in Federal court in diversity cases. By doing so, I can ensure that I will be made whole in the courts, and that my claim will be fully vindicated.

On the other hand, if, as Mrs. Schroeder mentioned, I am risk averse, I can avoid the loser-pays rule by filing in State court. In fact, under title I, I can prevent diverse defendants from removing. That is because the loser-pays rule in title I applies only to cases commenced in Federal court, not to those removed there.

There is also a cap to the fees that the loser will have to pay. They cannot be greater than the legal fees of the losing party itself. That limit ensures that the fees shifted to losing litigants will always be basically proportional to the loser's financial resources, not the winner's.

Finally, to address three points that Mrs. Schroeder made: First, it is true that in England there are some who are complaining that it is not easy enough to file a lawsuit. Chiefly, it is lawyers who are doing the complaining.

And as to whether it is easy or not for people without resources, as compared to the rich, to bring legal suits, we must keep in mind that in England there is no such thing as contingency fees, whereas in America we have that.

Second, Florida, the problem with that law was that there were too many exceptions. Application of the rule was uncertain and, in fact, permitted too much discretion from the judges. In Florida, judges are elected and, according to many commentators, beholden to the trial lawyers, in the same way as were the legislatures in so many States where lawyers have excessive influence on the process. As a result, doctors saw this as a one-way street. When they lost, they always got hit for fees, whereas when they succeeded, they never got their fees.

Third, we have to stress that this is a very limited experiment. If the problem is as bad as I outlined, isn't it worth it to try this experiment? Diversity cases cover a wide range of jurisprudence, facts and legal statutes in America. It will be a great test of the

winner-wins, loser-pays rule in an American setting. It is an opportunity for us to give plaintiffs choices that they do not now have.

The lessons of experience from around the world weigh heavily in favor of this rule. Various forms of it have been enforced around the planet for a very long time. It isn't just the English rule. It really is the everywhere-but-America rule. These reforms in our country are long overdue and much needed to restore faith in our oft-maligned legal system.

I thank the chairman.

[The prepared statement of Mr. Cox follows:]

**PREPARED STATEMENT OF HON. CHRISTOPHER COX, A
REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA**

Public opinion surveys show that, as low as the President's approval rating is, and as low as public approval of Congress is, the civil justice system scores lowest of all. Almost no one in America thinks our current legal system does a good job.

Given the facts, this should come as no surprise. There are 260 million people in America. And each year, there is enough litigation for every one of them to have his or her own lawsuit. In 1990, there were over 100 million lawsuits filed in state courts alone.

Is this too much litigation? Many lawyers say no. On the other hand, while America represents a tiny fraction of the world's population, we have the vast majority of the world's lawyers. Our nation now has more than twice as many lawyers as it did 20 years ago. If all of America's lawyers were to physically attend the American Bar Association's annual convention, it would have to be held simultaneously in the Astrodome, the Super Dome, the Metro Dome, the L.A. Coliseum, RFK Stadium, Wrigley Field, Dodger Stadium, Candlestick Park, The Rose Bowl, The Cotton Bowl, and the Orange Bowl.

In my home state of California, in 1987, just a few years ago, there were 107,000 lawyers. In the next five years, while businesses and providers were leaving California, the state gained 28,000 lawyers, an increase of more than 25%. And as fast as the number of lawyers have been growing, their legal fees have been growing faster still. In 1992, California lawyers took in \$16 billion

in fees. That is up 57% in five years.

Needless to say, not all of these lawsuits and not all of these legal fees are socially beneficial. In a recent issue of Newsweek, columnist Robert J. Samuelson had this to say:

[Lawyers] have an economic interest in cultivating and prolonging conflict. This means they are fundamentally at odds with the purposes of the legal system. Courts and lawyers exist only to explain and enforce the rules society sets for itself--and settle disputes arising from these rules. . . . The trouble is that lawyer's well-being runs in the opposite direction. The more conflict, the better. The more cumbersome and ambiguous society's rules, the better.¹

Ambiguous, cumbersome, unpredictable, burdensome, and expensive. That, unfortunately, describes our current civil justice system. Today, far too many people believe that instead of the maxim "Equal Justice Under Law," our legal system merits the admonition from Dante's *Inferno*: "Abandon hope, all ye who enter here."

One tragic result of all these lawsuits is that America is fast becoming a nation of victims. Individual responsibility for the consequences of ordinary living is becoming a lost virtue. It seems as if no injury, real or imagined, can occur in America today without its own lawyer and lawsuit. These days, even a spilled cup of hot coffee in a woman's lap in a moving car can be worth more than half a million dollars, if only you're willing to sue. Our legal system is in fact a great Wheel of Fortune.

Unfortunately, unlike the TV game show, our legal system inflicts serious injury on many of its unwilling contestants. In an age when damages are routinely awarded not just for real injuries--like the cost of fixing a broken car, or lost wages--but also millions more for "pain and suffering" and "emotional distress," it is ironic that the one kind of serious injury that can occur without any legal remedy at all is injury inflicted by lawyers themselves.

¹ Robert J. Samuelson, "I am a big lawyer basher," Newsweek, April 27, 1992.

Just as Congress so long exempted itself from the laws that apply to every American, the legal system is exempted from any responsibility for the pain and suffering, the emotional distress, the lost wages, and the lost jobs that it causes.

The filing of a lawsuit doesn't tell us anything about who is right and who is wrong. But it does give enormous power to the person who files it. Simply by filing a lawsuit, any person and his or her lawyer can take depositions of every worker in a company. They can turn your home or your office upside down, and require you to produce thousands of documents. They can force you to spend hundreds of thousands of dollars in legal fees. And if you, the hapless victim of a baseless lawsuit, decide to fight to prove you're right, and if you pay your own legal fees to the very end of the lawsuit, when finally you are completely vindicated, where does that leave you? What is your remedy at law for the money damages, the lost productivity, the emotional distress, and the loss of reputation? The answer is, you have no remedy. No recourse. Nothing, absolutely nothing.

This is a tragic and absurd result from a system that presumes to go by the name of "justice." But it is the necessary product of our unique "winner pays" system. Almost everywhere else in the world, if you win your case, you are made whole. Yet in our system, strangely, the loser doesn't have to pay. So even if you win, you lose. Indeed, the only sure winners in today's legal Lotto are the lawyers. No wonder a majority of Americans, according to a survey published January 30, 1995, in U.S. News and World Report, think lawyers simply use the system to make themselves rich.

Something must be done to stop the virulent spread of such abusive and wasteful litigation. That's why the central element of the Common Sense Legal Reform Act is the "full recovery" rule. It is also known as the "loser pays" rule, or the English Rule, or the "Everywhere But America Rule." Under the full recovery rule, if you win your case, you win.

The full recovery rule is a necessary part of the cure to America's lawsuit epidemic. It expedites the resolution of strong cases, and deters the filing of frivolous ones. To see why, consider two examples.

In the first case, let's say you're sued for \$100. The plaintiff's case is weak, but defending it will cost you \$20. So you know that even if you go to

court and win, you'll lose \$20. Under the current "winner pays" system, there's a powerful incentive for you to settle for \$19.99 and get the whole thing over with. In this way, the present system actually encourages the filing of "nuisance suits" designed to extort so-called "settlements."

The full recovery rule, on the other hand, would discourage the filing of this particular lawsuit. Under the full recovery rule, you might be willing to pursue your case, because you'll come out better if you win. The loser will have to pay all of your damages, including your attorneys' fees. Most important of all, by eliminating the opportunity for legal extortion, the chances are that this weak case wouldn't be filed in the first place.

Now let's take the opposite scenario. You sue Hazard Industries for \$100. Your case is strong--and the defendant knows it. Under the current system, Hazard Industries is tempted to stretch out the case for years, increasing your costs in order to force a smaller settlement for, say, \$50. This needless delay clogs up our legal system. It also results in you, the injured party, receiving less than the amount to which you should be entitled.

The full recovery rule, on the other hand, would encourage the speedy resolution of your meritorious case--with a higher award for your injury. If Hazard Industries stretched out the litigation to delay the inevitable result, it would have to pay the full amount of your damages, including your attorney's fees.

The goal of our civil justice system should be to restore the prevailing litigant to the same position he or she would have had if the challenged action (or the losing lawsuit) had never occurred. Under the current system, neither plaintiffs nor defendants have that opportunity. But the full recovery rule in the Common Sense Legal Reform Act will guarantee that the winner in a lawsuit actually wins.

One final point: the full recovery rule in Title I of the Common Sense Legal Reform Act is purposely designed to advantage plaintiffs with good cases. By applying the rule only to diversity cases, we will always be giving plaintiffs the opportunity to decide whether they wish to use it or not. Since diversity cases can always be brought in state court under the current "winner pays" system, plaintiffs and their lawyers will be able to choose the option of full recovery or avoid it. Currently, full recovery is unavailable in either state

or federal court. But if this bill is enacted, plaintiffs will, for the first time, have the option of choosing the full recovery rule.

This question of expanded options is a critical one. If I am a plaintiff, and I believe my claim is strong, I can file even my state claims in Federal court in diversity cases. By doing so, I can ensure that I will be made whole if the courts vindicate my claim.

On the other hand, if I am more risk averse, I can avoid the loser pays rule by filing in state court. In fact, under the Common Sense Legal Reform Act, I can even prevent diverse defendants from removing to federal court to obtain the benefit of the loser pays rule. That's because the loser pays rule in the bill applies only to cases commenced in federal court not to those removed there.

In addition, there is the limitation that the award of fees to the prevailing party cannot be greater than the legal fees of the losing party itself. No one in a potentially winning position should be beggared by legal expenses necessary to vindicate their position. To this end, the caps on attorneys' fees in the bill ensures that the fees owed by losing litigants will always be basically proportional to the losers' financial resources--not the winners'.

The lessons of experience weigh heavily in favor of the full recovery rule. Various forms of "loser pays" have for decades been successfully implemented in virtually every jurisdiction in the world--except ours. It's not just the "English Rule"--it really is the "Everywhere But America Rule." These reforms are long overdue, and much needed to restore the people's faith in our oft-maligned legal system.

Mr. MOORHEAD. I want to thank both of you for very well-prepared and delivered statements here this morning.

We are not going to have questions of this panel. I know you are in a hurry to get other places that you need to go, and we want to get our second panel on as early as we can. We would appreciate any help and information that you can give to us as we go along on this issue.

Mrs. SCHROEDER. Mr. Chairman—

Mr. MOORHEAD. I would like to greet our next panel of witnesses who will address the so-called loser-pays or English rule of fee shifting.

Our first witness is Mr. Walter Olson, a senior fellow at the Manhattan Institute. He is the author of "The Litigation Explosion: What Happened When America Unleashed the Lawsuit." He has written extensively on the law and regulation and was the editor of "New Directions in Liability Law" published by the Academy of Political Science in 1988 and "Historical Roots of the Litigation Crisis," a symposium published in the Cardozo Law Review in 1989.

In addition, he has discussed fee shifting and rule 11 in, among other articles, "Better Living Through Litigation?" and "Make the Loser Pay," published in Readers Digest in May 1992. Mr. Olson is currently at work on a book on employment law.

Welcome, Mr. Olson.

Our next witness is Prof. Thomas D. Rowe, Jr., from Duke University School of Law. After clerking for Justice Stewart and engaging in private practice in Washington, Professor Rowe joined the Duke law faculty in 1975. Prior to that, he served as a lawyer with the U.S. Senate Judiciary Committee and the Department of Justice.

Currently, Professor Rowe is a member of the Federal Advisory Committee on Civil Rules; and, therefore, anyone who is unhappy with the current status of rule 11 should contact him directly.

In 1991, I had the opportunity to work with Professor Rowe on the Federal Courts Study Committee, an experience that I think was a very positive one for both of us.

Welcome, Professor Rowe.

Our final panelist is Prof. Herbert M. Kritzer, a professor of political science and professor of law at the University of Wisconsin. Professor Kritzer has received several awards and research grants from such institutions as the National Science Foundation.

He has written extensively about various aspects of our legal system. Two of his most recent efforts include an article entitled: "Lawyers Fees and the Holy Grail: Where Should Corporations Search Next?" which was published in *Judicature* in 1994 and another article entitled: "The English Rule," which appeared in the *ABA Journal* in November 1992.

Welcome, Professor Kritzer.

We have your statements which I ask unanimous consent to be made part of the record, and I ask that you summarize your statements in 10 minutes or less.

I ask that the subcommittee members hold their questions until all three panelists have completed their oral presentations.

**STATEMENT OF WALTER K. OLSON, SENIOR FELLOW,
MANHATTAN INSTITUTE**

Mr. OLSON. Thank you, Mr. Chairman.

After Congressman Cox's remarks, I must say, I am scrambling to readjust my notes to figure out what portions of them will still seem original. He summarized the case very well.

As he said, this body has recently led the Nation through a debate about whether this branch of government should try to live by the rules that it sets for everyone else. We now begin a national debate on whether another great branch of our Government, the civil justice system, will have to live within the rule it prescribes for everyone else, the rule of compensation for injury.

This bill is, of course, a part of the Contract With America but it is also, or ought to be, a bipartisan issue. Last month in the New York Review of Books—not usually a crib sheet for the new Republican Congress—the respected writer James Fallows after criticizing much of the Contract called the loser-pays rule “overdue” and described the version we have here with its rule on not having to pay a larger fee to your opponent than you would pay your own lawyer as “surprisingly solicitous” of the interests of less affluent persons.

Other well-known commentators who have written in favor of loser-pays include Michael Kinsley and Steven Brill, editor of the American Lawyer and head of Court TV. Neither of whom is to be mistaken for a conservative ideologue. Mr. Brill made quite a stir in the Washington Post in June when he said that the loser-pays reform was, “overdue.” Mention should be made also of the editor of the Washington Monthly, Charlie Peters, who has perhaps longer than anyone else fought the good fight for this.

Congressman Cox mentioned the U.S. News cover story a couple of weeks ago entitled: “How Lawyers Abuse the Law,” January 30, 1995.

Another poll that I found amusing and encouraging. U.S. News asked the respondents the following question: If someone sues you and you win the case, should he pay your legal costs? Eighty-five percent of the public said, yes.

Then they turned the question around and asked, If you sue someone and lose the case, should you pay his costs? Only 44 percent said yes to that one.

Forty-four percent is not all that low a number for a novel idea. Eighty-five, of course, is remarkably high. The midpoint is 65 percent in favor. Close to half the respondents find the justice of this idea so obvious that they are willing to endorse it even when it cuts against them. Fewer than one in six feel that strongly about the current rule. Among those who have thought through the issue enough to have a consistent view one way or the other, loser-pays seems to win by three to one or better.

As we know, unfortunately, that 15 percent who are dead set against it are well represented in this city and in the profession that usually comes before you in this committee. I should say that I am not a lawyer. The organized bar is pretty unanimously against it so far as I can see. The plaintiffs' bar, of course, is at the forefront. They explain that it would be bad for their clients. The research institute representing defense lawyers has come out

against it. They say it will be bad for their clients. The ABA Section of Litigation draws members from both sides and has just come out with a statement that it is a really awful idea—for their clients, of course.

It is true that all these groups raise legitimate concerns which I hope we can address as we go along. And it is also true that the current draft needs some tinkering in my view.

English rule as you have heard is a great misnomer. The rule prevails not only in England but also in France, and Germany, Sweden, Denmark, the Netherlands, and other social places not usually seen as providing blueprints for Contract With America reforms. Japan is an exception which we may hear about and a very exceptional exception indeed.

Loser-pays goes back not only to the very early Anglo-Saxon law but to the Roman law which spread across continental Europe. The Scandinavian legal systems did not develop from Roman law but nonetheless adopted loser-pays. Loser-pay was even found in the ecclesiastical courts which became important after the fall of the Roman empire and which also drew from Roman law.

It is not inappropriate to call it the rest-of-the-world rule. I know of no country, including Japan, which does not go much further than we do either to put a price tag on suing unsuccessfully or to compensate those who prevail—and usually both. The details differ from country to country, but the principle does not.

There is controversy from time to time in these other countries. There was an effort to repeal the rule in Germany some years back which failed. I believe the efforts to repeal it in England will fail also.

The question that we are left with—the mystery, if you will—is as follows: If as we keep hearing in this country loser-pays is obviously unworkable, how have they managed to keep it working for millennia so many other places? If it is horribly unjust, why has it evolved and endured independently in so many different kinds of countries governed by the great philosophies and religions of mankind? If it is nothing more than a way for the rich to grind down the poor, why does it prevail in the social democracies of Europe—the Netherlands and Sweden and Denmark and the rest?

The mainstream of legal opinion in pretty much all these other countries has long considered loser-pays to be the natural, logical and obvious rule on grounds of both practicality and fairness.

Litigation is extraordinarily costly to society. The person who insists on it by not taking a reasonable settlement or not offering a reasonable settlement if they are liable has inflicted a heavy cost on the opponent and on society, including third parties who are dragged into the suit and other litigants who must wait longer for trial of their cases.

If we wish people to take a sober look at what they are doing before they throw this cost bomb into their fellow citizen's affairs, we need a price tag with some number on it other than zero. So goes the practicality argument.

In practice, loser-pays encourages some strong claims, especially small ones, and discourages the longshots. That is exactly what we need in this country where someone can do you out of \$20,000 in New York City, and you can't economically go to court to get it

back because you will always be spending more than that on the process itself. It is exactly what we need to discourage the longshot cases that occasionally get turned out as remarkable stories in the lower paragraphs in the paper, and more often are quietly settled for payment before hand.

Asked why they are willing to put up with such a terrifying system, Europeans will typically answer, first, it is the American court system that is the terrifying one. They will point out that over there, as of course, also here, the overwhelming majority of cases settle before trial. The effect of loser-pays is to raise or lower the amount of settlements as well as to change the manner in which a given case is prosecuted. More about that in a moment.

Europeans might point out that it is our rule that makes litigation more terrifying by encouraging people to drag in every issue and make every possible demand on their opponent. The substantive risks of litigation can be a lot more terrifying than the fee risks, especially for a defendant. You curb the substantive terrors of litigation when you put an explicit price tag on using them in a bad cause.

The fairness arguments for loser-pays are, if anything, more compelling. Congressman Cox summarized them briefly.

What has happened to you when you are dragged through one of these lawsuits when you are done out of your life savings and your reputation, as the case may be, or some smaller amount, and the other person walks away? Or when a defendant, if you filed a good case, drags things out and uses motions practice to make you wait and grind you down? What has happened is not merely very expensive justice or very inconvenient justice or very long-drawn-out justice. What has happened to you is an injustice, and other countries recognize that.

There is growing interest here in the English rule, but there is not as yet a terribly clear idea as to exactly how it works. One of the most common misconceptions is that it is all or nothing—either a huge pot goes to the winner or nothing at all.

This is not the way loser-pays works in most countries. They divide the case into issues, and look at who won on which issues. This means the fees can flow in both directions which provides a very strong incentive for even someone likely to win not to raise unnecessary issues and longshot extra claims. This point is tremendously important and not always considered as we craft American equivalents.

Most important of all is the way most countries handle damages. If you come to court in Germany or France and you ask for a million marks or francs in damages and the case comes to trial and you prove only 100,000, you have exaggerated your claim by 90 percent. Some important quantum of fees will be shifted against you as a penalty for having tried to blow up a small case into a big case. This provides a strong, obvious incentive not to exaggerate the way we so often do hear.

I spoke with a law professor from Switzerland who told me that in that country and in Germany the first order of business when a plaintiff with a good case comes into the office—after, of course, determining that it is a good case—is to figure out what the right amount of money to ask for is based on what the courts have given

out for that kind of damage. And, as a lawyer, he should ask for that amount and not more, not less.

Any American lawyer who handled a case that way would probably be sued for malpractice by his client, were he not earlier disbarred on grounds of insanity.

Mr. MOORHEAD. Could you summarize in another minute?

Mr. OLSON. The current bill has weaknesses on the points that I mentioned defining who has prevailed when there are multiple issues, and several features which I will briefly mention.

We ought to put in more specificity on the range of judicial discretion in granting exceptions. We need exceptions, as Europe has exceptions. However, we ought to say more about what those exceptions are.

We also should look carefully at the application to be filed in diversity cases which has been described, simplifying only slightly, as loser-pays at plaintiff's option. Whatever the advantages of giving plaintiffs new options—and there are some in vindicating more good cases—we cannot claim this will reduce the number of frivolous cases if people can just take those cases to State courts.

To sum up, any system of legal process carries the risk that people will use it mistakenly or in a bullying spirit. Other countries recognize that danger. They attach a price tag to discourage it. We should, too.

[The prepared statement of Mr. Olson follows:]

PREPARED STATEMENT OF WALTER OLSON, SENIOR FELLOW, MANHATTAN INSTITUTE

Thank you, Mr. Chairman, for the chance to speak about Section 101 of the proposed Common Sense Legal Reforms Act of 1995. This section would provide for awarding attorney's fees to the prevailing party in so-called diversity litigation in federal courts.

My name is Walter Olson. I am not an attorney. I am a senior fellow with the Manhattan Institute, which is based in New York. Today, however, I am speaking only for myself. In 1991 I wrote a book entitled "The Litigation Explosion" (Dutton/Plume), which looks into the question of why we have so much litigation in this country and what can be done about it. The book argues that the best way to address the problem would be to move toward the "loser-pays" principle found in other countries. So you have caught me out on one of my pet topics.

On a personal note, I'm delighted to be back among old friends in this body. Years ago I worked as a legislative analyst for what was then the minority party in this House. The House Republican Research Committee at that time occupied a space very high up in Longworth, confined to the attic almost, as in a Gothic novel. I understand that it has moved to better office space recently.

I come here today, however, on behalf of a cause that ought to be very much bipartisan. The loser-pays principle is found in countries around the world representing every shade of political opinion. That includes countries like Sweden, Denmark and the Netherlands which are not usually thought of as laboratories for conservative reform.

In this country as well, the issue cuts across political lines. In the January 12 New York Review of Books the writer James Fallows, who it's fair to say is no great fan of many of the provisions of the Contract with America, says the loser-pays idea is "overdue" in this country. He also describes the bill we are discussing today as "surprisingly solicitous" of the interests of less amount persons. More on that below.

Last June Steven Brill of the *American Lawyer* and Court TV, an acute observer of our legal system, wrote in a widely noted piece in the *Washington Post* (June 5, 1994) that against some of his own original instincts he had reached the conclusion that abusive litigation is rampant and that vigorous measures against it are needed. "The cure is simple, and overdue," he said, and went on to propose a general loser-pays rule with features that would, in fact, go well beyond those of the bill we are discussing today.

Over the years, one of the most energetic advocates of the loser-pays principle has been Charlie Peters, editor of the excellent magazine *Washington Monthly*, which

is often described as neo-liberal. Without suggesting that Mr. Peters would agree with everything I say, or vice versa, I'd like to take this opportunity to salute him for his eloquent advocacy of this reform over many years.

It is not such a lonely fight anymore. Or so I conclude from the newest opinion survey, which was reported in a recent U.S. News & World Report ("How Lawyers Abuse the Law," cover story, January 30). It had an amusing twist. They asked the following question: "If someone sues you and you win the case, should he pay your legal costs?" 85 percent said yes. Then they turned the question around: "If you sue someone and lose the case, should you pay his costs?" Only 44 percent said yes to that one.

We may smile at the spread between the numbers, but look more closely. 44 percent is not that low a number and 85 percent is quite high. If you take the halfway point, you get 65 percent in favor, or nearly two-thirds. Close to half the respondents find the justice of the loser-pays idea to be so plain that they favor it even when it cuts against them. But fewer than one in six admire the current rule enough to go to that extreme. To put it another way, among people who have thought the issue through to a consistent view one way or the other, the loser-pays idea wins by something like three to one.

Unfortunately, it sometimes seems as if the fifteen percent who oppose it include every organized lawyer across the land, from Kodiak to K Street. The plaintiffs' trial lawyers are at the forefront, explaining that it would be bad for their clients. Not far behind are many in the defense bar, who say it would be bad for their clients, the same ones who are sued by the first group. The ABA Litigation Section, with members from both sides, thinks it's an awful idea—for their clients, of course. It is no secret that the big business community has been less than enthusiastic. It's true that all these groups raise legitimate concerns, which I hope to address as we go along. And it's also true that the current draft needs some tinkering, at least.

Let me start with some background. It is usual to contrast the American Rule with the English Rule. Both terms are misleading. In the first place, America is far from consistent in following the so-called American Rule. In recent years, Congress has enacted some 150 different laws which require losing litigants to pay legal fees. We already have a great deal of fee-shifting. The difference is that it is *one-way* fee-shifting: losing defendants pay plaintiffs, but losing plaintiffs do not pay defendants. Heads-I-win, tails-we're-even, you could call it. I will not stop to debate the merits of this idea, except to observe that of the four different ways one might shift fees—one way in either direction, both pay, or neither pay—this is the method that manages to encourage the most filing of suits.

Remember this when it is claimed that any move toward loser-pays would be hasty or radical. For years Congress has been pleased to create new one-way fee shifts almost routinely, with very little public debate, for the benefit of plaintiffs. Doing it on behalf of plaintiffs and defendants together should not prove to be such an exotic departure that we must wait for a commission to report back after studying the matter for ten years.

"English Rule" is something of a misnomer as well. The loser-pays rule is found in English law. But it also goes back to Roman law. It is found in the civil law systems all over Continental Europe which evolved from Roman law and were codified in France, Germany and elsewhere at the time of Napoleon. It even developed in the church courts. Scandinavia, unlike most of Europe, does not trace its civil procedure to the Romans, but nonetheless developed loser-pays. Rather than the English Rule, some have called loser-pays the Rest of the World rule. I do not claim to know the rules of procedure in every country around the globe, but I do not know of any country that does not go further than this country does to put a price tag on suing unsuccessfully, compensate those who prevail, or both. (The most useful single survey, from which I draw many of my details here, remains the article by Werner Pfennigstorf in the *Journal, Law and Contemporary Problems*, in the 1984 symposium edited by Professor Thomas Rowe.)

This raises several immediate questions. If, as we keep hearing, loser-pays is obviously unworkable, how has it managed to work in so many places for so long? If it is horribly unjust, why has it independently evolved and endured in countries governed by so many of the great philosophies and religions of mankind? If it is nothing more than a way for the rich to grind down the poor, why does it prevail in what are usually seen as the most progressive social democracies?

In fact, the mainstream of Western legal thought outside this country has long considered loser-pays to be the natural and logical rule on grounds of both practicality and fairness. Start with the practical reasons. Litigation is tremendously costly to the parties and to society at large. Its cost should be borne by those who insisted on it, whether that means the plaintiff who refuses to accept a reasonable settlement offer, or the defendant who was liable but refused to make such an offer. By

forcing a trial, the losing side has squandered not only the opponent's money and time but also that of the public which foots the bill for the court system, the other litigants who are waiting in line for their cases to be heard, and the variety of third parties who get dragged in, such as witnesses summoned by compulsory process. If we wish to match the perceived costs of people's actions to the actual costs, and encourage them to take a sober look at the merits before lobbying this kind of cost bomb into their fellow citizens' affairs, then we will have to stop pretending that all this comes for free.

Fairness goes hand in hand with practicality here. Litigation is one of the most unpleasant things that can happen to people. It eats up not only money but time, energy, and privacy. It is commonly an assault on reputation and good name as well. It is a breach of the social peace. If, at the end, the targets manage to show they were completely right, the person or lawyer who put them through all this can just walk away under our present rule. This is worse than just wasteful and inefficient. It's unfair. And the public knows it. If someone injured you in any other way, our organized bar would be eager to lend a hand in making that person compensate you—to make you whole, as the phrase goes. But they are much less keen on compensating injury and deterring misconduct when it comes to the people *they* injure. Which is why, if you want to hurt someone in this country, don't do it with your fender or your scalpel. You might have to pay. Do it with a lawsuit.

No misconception about loser-pays is more prevalent than the one that runs as follows. Someone sues you in Europe. They drag in a dozen different theories of liability against you, the way they would in America. You know you are mostly in the right, but the law is complicated and chancy, and they manage to land one punch, proving liability on a minor theory for a small amount of damages. Next thing you know you are presented with their bill for 10,000 hours from the Belgian or Austrian equivalent of Cravath, Swaine & Moore. You might just as well sign yourself into indentured servitude and get it over with. Other defendants over there are so afraid of suffering this fate that they never resist lawsuits, but that's okay because all the plaintiffs are so frightened of the same thing that they never file them. Or so the theory goes.

That is not, fortunately, the way loser-pays actually works in other countries, and it's not the way it would have to work under this proposal, especially not if we handle its details with care. Courts in loser-pays countries typically are at some pains to divide the dispute into its underlying claims or issues, and split the pool of fees according to who prevailed on what. This has several important implications. A defendant who concedes liability on one ground but successfully fights others may in fact be the prevailing party, and may collect a fee shift in the form of a deduction from what would otherwise be owed to the plaintiff. If each side wins on some issues, the net shift may go in either direction and may be added to or offset from the sum awarded to the plaintiff. So the side that wins on a so-called technicality will not necessarily capture all or even most of the fee pot. Just as important, the loser-pays rule gives each side a powerful incentive to take only its strongest claims to trial—as the song goes, to know when to hold them and when to fold them.

Section 101 of the Common Sense Legal Reforms Act of 1995 as presently drafted divides things up by "claim"; it tells the court to award a fee "to the party that prevails with respect to a claim in such action." There are serious dangers here which arise from the fact that the legal definition of "claim" may not correspond to what the parties are actually fighting about. In particular, it is very common for parties to be fighting mostly about the level of damages and only secondarily about liability. The present language might force courts to assign fees based on the event of liability alone. That could force defendants to foot the bill for losing damage arguments against themselves, with consequent injustice and misplaced incentives.

Such applications of the rule might if anything worsen one of the reigning abuses in today's American litigation, namely the exaggeration of damages. Other countries are careful to control this abuse. In most European courts, if a plaintiff claims a million marks or francs in damages but proves only a hundred thousand, he is considered to have lost on much of the case and will accordingly find some portion of fees deducted from his award. Werner Pfennigstorf writes, "It is easy to see how this particular rule discourages plaintiffs from making unrealistically large damage claims. There are, of course, instances when it is impossible to calculate a damage claim with absolute precision, but the European codes offer a sufficient variety of procedural devices to prevent hardship in such cases." I should note that England handles the problem of damage inflation in a different way, through a so-called offer-of-settlement or pay-into-court procedure which must be purposely triggered by the opponent rather than taking the form of an automatic penalty.

Not long ago I spoke with a law professor from Switzerland about this matter. He told me that in that country and Germany, the two systems with which he was

most familiar, the first order of business when a plaintiff walked into the office with a good case, after determining, of course, that it was a good case, was to figure out what a reasonable amount of money would be to ask for, based on what the courts had awarded in similar cases. As a lawyer it was incumbent on him to ask for that amount, neither more nor less—not less, because he wanted to do right by the client, but not more either, because he wanted to avoid a fee penalty for having embezzled. I think an American lawyer who handled a case that way would probably be sued for malpractice, or disbarred on grounds of insanity.

We should make it explicit in the bill that a failure to prove claimed damages is in itself ground for a partial fee award to the opponent, offsetting or otherwise. The case for such fees is especially compelling, of course, when the opponent has expended fees specifically on disproving damages. A different approach also well worth exploring is that of strengthening federal Rule 68, as Judge William Schwarzer and others have urged, into something closer to the English practice by allowing the shifting of attorney's fees to the party that rejects an offer of settlement.

Defendants, meanwhile, come under their own set of pressures under loser-pays. If they are tempted to stonewall and drag their heels on claims they are destined to lose, it may focus their mind to realize that *two* sets of meters are now running. They had also better think twice about marginal defenses and counterclaims and depositions and motions and interrogatories and document demands—the whole arsenal of complication and delay. The message defendants get is: if you're right, take heart; but if you're wrong, better pay up rather than put the claimant through an ordeal.

A crucial function of the courts in all this, of course, is to make sure claims for legal fees themselves are not "gold-plated." European systems maintain careful controls to keep this from happening. They typically provide that costs may be recovered only for reasonable and necessary expenditures; that the loser can contest the fee award as exaggerated; that it will not do to bill at Cravath rates if a Main Street lawyer would have sufficed; and so forth. The bill we are considering, Section 101 of the Common Sense Legal Reforms Act, includes an added safeguard of this sort. It provides that the fee paid by the losing side will not be higher than that which would have been reasonable as a fee for its own lawyer. We should welcome suggestions of additional methods to help the courts avoid the danger of overbilling. Such controls, it might be added, are overdue in today's one-way fee-shifting as well.

It should be noted that the money spent on attorneys' fees is only part of the cost inflicted by litigation, and not always the most hurtful part. I have a soft spot for Sweden and Norway, which reportedly require that losers compensate winners for the time and energy spent on compulsory court appearances. That would certainly put a crimp in the power of American litigators to bully their opponents around by ordering them to depositions. In general, however, no country tries to make the victims of litigation completely whole. They just go a lot further in that direction than we do.

No brief discussion such as this can do justice to all the subtleties of fee-shifting as it has developed over centuries and even millennia of experience. Suffice it to say that if we choose to move in this direction, we will find a very rich literature and a very wide record of human experience to guide us in our efforts. Some countries entrust fee assessment to specialized magistrates (England's "taxing masters"), while others treat it as an issue of damages to be decided by the judge along with other damages. Loser-pays countries also recognize numerous exceptions and special cases, and it would be appropriate for us to do so too, so long as they do not swallow the general rule. (One exception often found provides for a waiver of the fee shift in unusually close cases, as where a panel of judges is split or a decision is overturned on appeal.) The present bill includes a provision that would allow for the carving out of such exceptions and special cases. It provides that judges may waive or reduce fee awards "to the extent that the court finds special circumstances" that make such an award "unjust." I would urge Congress to consider clarifying what kinds of exceptions are meant, or encourage formal rule-making with the aid of the courts. We should not foster needless uncertainty, much less litigation, about which cases are suitable for exceptions.

Turning to the principal arguments against loser-pays, we might observe that two of them are closely related to each other. One is that the rule would terrify litigants with good cases out of their claims. The other is that, whatever its virtues as applied to litigation between large entities, it would be unfair or impractical as applied to cases involving litigants of modest means.

The terror argument is based on the observation that even the best case can lose, and even the worst case can win, on a fluke. There are no sure things in the jury box, or for that matter in the judge's chambers. So we are told by the Association of Trial Lawyers of America and the American Bar Association, and they ought to

know. They assert that even the remote chance of paying two fees would scare people out of insisting on their rights, in a way, presumably, that the dead certainty of paying one big fee does not scare many people now.

These distinguished lawyers now tell us that there is a random factor in our court system that puts even the most innocent litigant in the world under a genuine fear of losing. I would never think of challenging this admission. In fact, I am delighted to enshrine it permanently on the record, because it's one they're so reluctant to make on other occasions. When people like me charge that bad lawyers can make a living off shoddy cases, ABA and ATLA respond that we must be imagining things. If a lawyer gets paid only when he wins, why would he ever file a case that's destined to lose, and why wouldn't an opponent just hold out for the inevitable vindication? But if the filer of long-shot cases can rely on a random factor to scare his opponents—quite aside from the threatened cost of responding to the litigation, or the reputational threat—then it's not hard to see how abuses could become profitable. In fact, that's an important part of the case for loser-pays.

The idea of loser-pays, of course, is to improve the standing of the side with the better case, whichever side that may be. That is why I am always surprised to find descriptions like the following, taken from the news columns of the *Wall Street Journal* (Paul M. Barrett, "Warily, Hatch Mulls Changes in Civil Justice," January 31, 1995): "A loser-pays' rule would likely discourage suits by individual plaintiffs who under the current system don't face the risk of footing their opponent's bill." It would be equally accurate, or misleading as the case may be, to say, "A loser-pays' rule would likely encourage suits by individual plaintiffs who under the current system have to swallow their lawyer's bill but could now finally hope to make their opponent foot it."

We all agree that loser-pays would discourage many weak cases. It is like pulling teeth to get the other side to admit that it would also encourage many strong cases. In fact, although our current system is usually seen as pro-plaintiff, it actually does a poor job of vindicating many well-founded claims. The incentive it gives defendants to delay is one obvious example (and even awarding prejudgment interest won't help if the suit is being filed, for example, to obtain an injunction). Another category of case very ill-served by present rules is the fixed-dollar claim that doesn't include demands for punitive damages, pain-and-suffering or the like, as when someone has totaled your car when you weren't in it. Our failure to make the losing side pay means that even a defendant who knows he's liable has reason to offer less than full value as settlement in such cases.

Our fellow advanced democracies do much better at avoiding litigation than we do in this country. It is time we laid to rest the idea that these countries attained this measure of social progress by providing no remedy at all for the ordinary claimant with a good case—that they somehow forgot to consider such claimants' situation in drawing up their rules. No system is perfect, and all have quirks, but American lawyers have gotten away with painting a garish caricature of the way things work abroad. Writing in the *Duke Law Journal*, the distinguished Oxford scholar Patrick Atiyah observes that "the reality is that the accident victim with a reasonable case should be able to find a lawyer with equal ease in England and America." (1987 *Duke LJ* 1002, 1017.) Who would think so from reading ATLA's literature, or the ABA's?

Many in the defense bar and among large entities that get sued have a completely different and indeed opposite set of concerns about loser-pays. They warn that defendants would pay when they lost, but would not often collect when they won. They cite two reasons: first, judges would bend the law to help sympathetic plaintiffs; second, the fee awards would be uncollectible even if they were ordered. Both of these have been blamed for the failure of Florida's experiment in shifting fees in medical malpractice cases. In addition, they warn about the application of the rule to diversity cases, as described below.

Someone, it seems to me, must be wrong here. It is hard to imagine that the porridge is both too hot and too cold. Perhaps the ABA Section of Litigation could have its members huddle and get their story straight as to which is the hapless victim, plaintiffs or defendants.

On the question of bending the law, as I mentioned, the present bill allows judges to waive or reduce fees in special circumstances where such an award would be unjust. That does not strike me as an invitation to turn the exception into the rule. Cynics, it is true, could point to the amazing gymnastics engaged in by the U.S. Supreme Court in the 1968 and 1978 cases called *Piggie Park* and *Christiansburg Garment*, where the Court turned what lawmakers had written as an optional two-way shift into a mandatory one way shift. (*Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968); *Christiansburg Garment v. EEOC*, 434 U.S. 412, 421 (1978).) Again, further clarification of what might be considered unjust could only help.

The person who does legal damage for which he cannot pay might be called the uninsured careless motorist of the litigation world. Uncollectibility of fee awards has reportedly been a common experience of defendants in England, who would, nonetheless, never want in a hundred years to trade places with defendants in this country. There are several reasons to think that loser-pays has some effect in making even a penniless plaintiff think twice about filing a bad claim (assuming a lawyer is willing). First, it will be seen as some kind of hassle. Second, many such plaintiffs do not plan to go on being poor. Third, and surely most important, is the offset principle, or its close relative in England the offer-of judgment rule: if the plaintiff expects to win something, then loser-pays provides a check on holding out for too much.

A question increasingly being asked—by, for example, Steven Brill in his *Washington Post* piece—is why the lawyer who takes part ownership in a claim on the upside should not be put on the hook for the downside as well. The contingency-fee bar, after all, is a big believer in the ideas of joint and several liability, vicarious liability, enterprise liability and the like. Applied here those principles would lead to a stringent result, namely, holding the lawyer liable for all the damage done by his co-venture with the client, rather than just a proportional share. But perhaps no one should be treated that unfairly in our courts.

All those worried about loser-pays can take heart from the fact that in this country as in Europe the vast majority of cases settle short of trial. The main function of loser-pays, therefore, is to influence the nature, level and timing of the settlement. And the better a claim's chances of winning, the likelier that the rule will raise rather than lower its settlement value.

Visiting Europeans, asked about the supposedly terrifying nature of their fee rules, are apt to point out that to them it is our legal system that is the terrifying one. We are the ones who attach no downside to dragging in every issue and levying every possible demand on each other. So the stakes mount and mount to a ruinous level. Loser-pays adds a certain visible risk, but its wider effect seems to be to reduce the overall riskiness of litigation by narrowing issues and cooling overheated demands.

The proposed Common Sense Legal Reforms Act of 1985 does not try to introduce loser-pays all at once. It starts with one part of the system, allowing us to gain confidence and experience before deciding on further expansions. But where is the best place to start?

One approach would be to apply the loser-pays rule to actions based on federal questions generally, or particular federal statutes or groups of statutes. Another would be to take existing laws with one-way shifts and give them two-way shifts, or, if that was too awful a prospect for the affected interest groups, offer them the option of turning some into two-way shifts and others into no-way shifts.

This bill takes a different route. The group of cases it selects are those in diversity, that is, cases between citizens of different states which arise under state law but can be heard by federal courts as provided in Article III, Section 2 of the Constitution. Diversity cases are an intriguing and non-obvious choice of a starting place, though not necessarily a wrong one.

The corporate defense bar, which as mentioned is not exactly thrilled at loser-pays, is said to be particularly un-thrilled at the choice of diversity suits as the place to start. Here is their reasoning, if I grasp it a right. When plaintiffs lawyers sue an out-of-state company, they already have considerable discretion whether to prosecute the case in federal court or instead keep the opponent in state court by finding a local defendant to attach—defeating diversity, as it's called. This forum-shopping power already works to defendants' disadvantage, but they would be in even worse trouble if plaintiffs could choose between two different fee regimes. Plaintiffs with strong cases, or a high ratio of necessary legal expenditure to likely damage recovery, would be attracted to federal court. Those with weak cases would switch from federal to state court to dodge the risk of a fee award.

Up to a point, at least, I am not convinced that this would necessarily be terrible news for defendants, still less for the country. To begin with, you'd think it would be a clear good for strong cases to be better vindicated and for delay of such claims to be discouraged. Even defendants that pay in these cases may obtain some benefit from fee-shifting, if the offset principle can be established in a way that causes plaintiffs to press claims more cautiously and not add marginal claims and theories.

As for a switch of weak cases to state courts, it would seem unlikely for this in itself to produce a net loss for defendants. Multistate enterprises often say they would rather be sued in federal court because state courts dish out so much "home cooking" favoring local lawyers and plaintiffs. But when a plaintiffs lawyer's first choice had been to take a weak case to federal court, it's presumably because that case was an exception to the general rule: for whatever reason, federal court will

bring a bigger payoff. However, as Professor Rowe points out, there is yet a further twist: because Section 101 applies only to actions "commenced" under the relevant section of federal law, plaintiffs might succeed in getting into federal court anyway without risking its new fee policy if they filed in state court and their claim was then removed to federal court. It's one thing to have your cake and eat it too, but for plaintiffs' lawyers this could be like waking up in the Sara Lee factory.

How would the system adjust? If defendants' fears are accurate, federal courts would soon garner a reputation as the place lawyers went to first when they had a really good claim (not a bad boast for a court system) while state courts, handling an increasingly un-meritorious interstate docket, would come under new scrutiny and pressure either to adopt loser-pays themselves or to improve their screening of case quality in other ways. Perhaps my argument here is too speculative. It may be simply that the choice of diversity cases as the place to start represented a decision by the bill's drafters to try to defuse charges that the measure was harmful to plaintiffs interests by drafting it in a way remarkably favorable to them.

As this House hears from the contending political forces, I hope it will not forget the very real victims of our current practice. One is Martha Culbertson, whose family owns a winery that was named along with many other California wineries in a class-action suit. After fighting the case through the courts, her company and the other defendants won a complete victory at trial. At first, they were overjoyed. The joy began to wear off when they wrote a hefty check to their lawyers, without, of course, any hope of getting it reimbursed by the side that had been proved wrong. Then came word that the lawyers suing them were demanding more than \$450,000 from the various defendants. In exchange, they offered . . . not to file an appeal. So Ms. Culbertson's little family firm pulled out its checkbook again. "There are attorneys who focus their careers on lawsuits like this," she writes. "It is an immense danger to the small businessman. Cash reserves can be used up in the blink of an eye when in the company of lawyers. As long as it's possible for anyone to sue anybody over anything, we are all in danger." Her final thought: "It's so sad: we won, didn't we?"

Unfortunately, much of our legal establishment does not acknowledge, even in principle, that there is anything wrong with what happened to Martha Culbertson and thousands of others in her situation. But the public does realize it, and they will welcome a reform that advances the cause of simple justice. Any system of legal process carries the risk that people will use it mistakenly or in a bullying spirit. Other countries recognize that danger, and attach a price tag to discourage it. We should too.

Thank you.

Mr. MOORHEAD. Professor Rowe.

STATEMENT OF PROF. THOMAS D. ROWE, JR., DUKE UNIVERSITY SCHOOL OF LAW

Mr. ROWE. Mr. Chairman, it is good to see you again. I am Tom Rowe. I teach law at Duke. Members of the subcommittee and counsel, in light of some of the remarks by the first panel and by Walter Olson, which seemed to take the tone that if the organized plaintiffs' bar and the organized defense bar think that if this is a bad idea maybe we should all be for it, maybe I should emphasize that, although I am a lawyer, I am not a particularly organized member of the bar. And, in particular, although as Congressman—Mr. Chairman—Moorhead said, I do serve on the Advisory Committee on Civil Rules, I am here speaking only for myself.

I thought that it might help if I began by saying a word about any possible constitutional issues. As I say in my prepared statement, the breadth of congressional power to make procedural or at least arguably procedural rules for the Federal courts is quite broad. And while I would expect there to be some constitutional challenges raised if legislation along these lines were adopted, I would probably bet sooner on the Chargers in a rematch with the 49ers than I would on the success of such challenges.

The Supreme Court in cases like *Hanna v. Plumer* has stated Congress' authority quite broadly, and I think it would be hard for the Congress to draft legislation of the sort that it is considering that would run afoul of constitutional standards.

Now, I will go on to raise some critical questions about the loser-pays bill. I am not one of those people who will find a way of saying that just about anything I dislike must be unconstitutional. I think that legislation of this sort would be constitutional, and with that not a significant concern we can turn to the merits.

Although some previous speakers have called loser-pays the rest-of-the-world rule, Walter Olson mentioned that there is another conspicuous exception besides the United States. So it is not quite the rest-of-the-world rule. And, intriguingly, in light of their reputation for nonlitigiousness, that country is Japan. So the American rule is not always associated with high litigiousness.

What I would like to move on to is some general considerations about the loser-pays rule and then a couple of particulars with the current draft and, if time remains, some alternatives that the committee might consider if it is troubled by some of the particular features of this bill.

Concerning whether loser-pays attorney fee liability is fair, I think a key point to emphasize is that what it amounts to is strict liability, not fault liability. Even if you were reasonable in bringing a claim because it had a reasonable chance of success, a fairly high probability of success viewed going in; even if your conduct in bringing the claim in handling the lawsuit, and in pressing the claim was something we cannot say is unreasonable; nonetheless, the loser-pays rule would say that you had to pay the other side's fees. That is strict liability as opposed to what is known in tort law as fault liability.

For example, a doctor who reasonably undertakes a procedure with some risk but is not at fault—is not negligent—even though there is an adverse outcome, should not be held liable and I think ordinarily is not held liable. Doctors actually tend to do well in tried medical malpractice cases. So that loser is strict liability for bringing litigation, which raises troubling questions about whether it is truly fair.

When our systems adopt strict liability, they tend to do so in situations in which not only is there a sense that there may be some justice behind it as in product claims, but also the party likely to suffer from the strict liability to have to pay is someone who is a good party to bear the risk—in other words, a producer who is able to spread the risk by pricing products, et cetera. The loser-pays rule by contrast, sometimes puts risk on corporations and companies but puts it alike on losing individual plaintiffs who are among, in many cases, the poorest risk bearers around. It does not put it on their lawyers.

So as far as fairness is concerned, we have strict liability, notably, in another provision of this bill not before this subcommittee today: in the case of product sellers, the legislation would move away from strict liability—I suppose on the theory that it is not fair for product sellers to be held liable for product liability claims unless they have been somehow at fault or made an express warranty. So strict liability is not always appropriate, and it is ques-

tionably appropriate in many of its applications with regard to attorney fees.

With respect to some of the workings of the loser-pays rule, there is kind of an either/or that may arise which is that on the one hand, it may be ineffective, on the other hand when it is effective, it may be too harsh. It is ineffective often because it is simply difficult to collect. That was the experience of a lot of prevailing Florida doctors in cases involving losing plaintiffs.

It is of course all too effective against many losing defendants, have to be worth suing in the first place; they have the assets—it is a corporation—so you can collect. So there is something of a one-sidedness there that may be unfair to defendants.

As we have heard some discussion of the incentive effects on plaintiffs bringing claims, there have been references to strong claims and weak claims. A lot of claims are more somewhere in the middle, and particularly you have a claim with 80 percent chance of success, two-thirds chance of success, these are the cases in which plaintiffs faced with a substantial risk of the downside of having to pay the other side's lawyers' fees tend to get scared.

It can still be a meritorious claim with a significant chance of success, but the disincentives are very strong because of the downside risk facing someone with some assets but not so much that they can afford to pay a great deal. This doesn't affect indigents. Those are cases in which the rule is ineffective. So the discouraging effect may be particularly strong on medium strength, medium to moderately high strength claims that are not sure things, and that is where the largest concern about access to justice arises in connection with loser-pays.

There has been some mention of the encouragement of strong small claims by the loser-pays rule. That is true in general, but it doesn't apply to the proposal in H.R. 10 because, in order to come within the diversity jurisdiction, you need to claim for over \$50,000, so there would be little if any effect helping strong small claims.

Let me move to a couple of particulars about the working of H.R. 10. There has been a good deal of concern for the effects on a party who is forced to, say, defend against an unjustified claim. Of course, in order to mitigate some of the harsh effects that I have talked about, H.R. 10 contains a cap on the amount for which a party can be liable, the amount of your own fees, leaving the people who prevail nonetheless subject to many of the bad effects that the sponsors of the bill are concerned about and which they point to in defending the loser-pays rule.

I think that instead of the strict general liability of the loser-pays rule with some kind of limit, that we should focus more on bad-actor kind of claims. In those kinds of cases, there should not be a cap; if the claim has been frivolous, then there should be heavier liability on the other side, including the possibility of liability on the attorney.

Another feature mentioned is that H.R. 10 would apply solely to claims initiated by plaintiffs in the diversity jurisdiction. I think that it probably would be too harsh to change and have it also apply to removed cases because, imagine the situation of a plaintiff who had never left California, happened to be hit by an out-of-

State driver in California, files suit in California State court where they have the American rule, and then finds the case removed by a defendant.

If you change to make it applicable to removed cases, here is a plaintiff able to say I never left California, I filed in the California State courts, and here I am faced with the threat of loser-pays liability, even though I brought my claim under an American rule regime in California. How am I different from the person who was hit by a California driver and doesn't have to worry about that?

So I think you need to keep the inapplicability to remove cases, but it does give the effect that perhaps inadvertently this provision is something of a plaintiff's dream. The plaintiff's lawyer, because loser-pays doesn't apply to cases filed in State court, whether they stay there or are removed, could feel about this rule like Br'er Rabbit about the briar patch, because you file your sure thing in Federal court and lock in the certainty of a favorable fee shift, and you file your iftier case in State court and lock in protection against an adverse shift.

To finish on the subject, if you are concerned about some of these effects, one thing, the Federal system also tries already to deal with frivolous claims in rule 11 which was recently and carefully revised. You will hear about this from John Frank on the following panel, but I think it at least deserves a chance.

Second, there is another way of coming at some of these problems which is to consider enhancements of Federal rule 68 on offers of judgment, which I discuss in my prepared statement. There are many complex issues here and I should not oversell it, but it does permit people to make offers, you could add a provision that would trigger liability for their fee if the other side turns down the offer and doesn't do better at trial.

This would contain many of the favorable effects of the loser-pays rule, but would also let plaintiffs benefit from rule 68 on offers of judgment in Federal court, which they can't now, and would also address some of the claim-size problems that Walter Olson talks about by giving both plaintiffs and defendants incentives to make reasonable settlement demands and settlement offers under rule 68.

With that, I will conclude. Thank you very much.

Mr. MOORHEAD. Thank you very much.

[The prepared statement of Mr. Rowe follows:]

PREPARED STATEMENT OF PROF. THOMAS D. ROWE, JR., DUKE UNIVERSITY SCHOOL OF LAW

Mr. Chairman and Members of the Subcommittee, my name is Thomas D. Rowe, Jr., and I am a Professor of Law at Duke University. The subjects I teach include Civil Procedure, Complex Civil Litigation, Federal Courts, Judicial Remedies, and Constitutional Law. I have done research and published articles on various forms of attorney fee shifting rules; I have also worked for groups that have considered these issues, such as the Federal Courts Study Committee and the American Law Institute's study of Enterprise Responsibility for Personal Injury. I now serve as an appointed member of the United States Judicial Conference's Advisory Committee on Civil Rules, which considers proposed changes in the Federal Rules of Civil Procedure; in appearing here today, however, I speak only as an individual.

In this statement I cover four main areas: 1) briefly, the issue of constitutionality of a loser-pays attorney fee liability rule targeted on diversity cases; 2) some general points about the desirability of loser-pays and other attorney fee liability rules, including their fairness, the incentives they seem likely to create for the pursuit and

settlement of claims, and experience with some uses of the loser-pays rule in American jurisdictions; 3) specific observations on H.R. 10's use of the loser-pays rule for cases filed in the federal courts' diversity jurisdiction; and 4) possible alternative approaches or adjustments to the H.R. 10 version of the loser-pays rule.

I. CONSTITUTIONALITY

In my judgment, in adopting a loser-pays rule applicable only to cases filed in the diversity jurisdiction, Congress would be within its powers to legislate concerning jurisdiction and procedure in the federal courts. The Supreme Court's leading statement on the scope of Congressional power in this area, as with other federal legislative powers, speaks in broad terms:

[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and procedure in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

Hanna v. Plumer, 380 U.S. 460, 472 (1965). The Court has repeatedly and recently reaffirmed this broad "arguably procedural" definition of the scope of Congress's power over federal court practice and procedure, citing *Hanna's* formulation about matters that are "rationally capable of classification as either" substance or procedure in decisions upholding statutes and rules governing proceedings in federal courts. See, e.g., *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 198 (1988); *Burlington Northern R.R. v. Woods*, 480 U.S. 1, 5 (1987).

Whichever one thinks of the desirability of loser-pays fee shifting (and I have substantial doubts, which I will explain) it does not seem to fall beyond the "uncertain area between substance and procedure," and it is "rationally capable of classification" as procedural—especially considering the proponents' concern for frivolous litigation. I would expect constitutional challenges, based on arguments that Congress is stepping over the line into pure substance in cases otherwise governed by state law, if H.R. 10's loser-pays rule were adopted. Those arguments do not strike me as frivolous, and indeed they deserve some weight as policy reasons against the H.R. 10 proposal; but I would give long odds that such arguments would not persuade anything close to a majority of the Supreme Court that the measure was unconstitutional. Loser-pays attorney fee liability is at least arguably procedural, and given the breadth of its authority Congress need not adopt identical procedures to govern both diversity actions and other cases within federal court jurisdiction.

II. GENERAL ARGUMENTS FOR AND AGAINST THE LOSER-PAYS RULE

Most of the industrialized democracies follow some form of loser-pays rule for attorney fees in civil litigation, although the loser's liability is often only for part (sometimes a fairly small part) of the winner's attorney fees. The two main exceptions are the United States and—interestingly, given its reputation for non-litigiousness—Japan. In both the European and Commonwealth nations with the loser-pays rule, and here with the American rule that each side is responsible for its own attorney fees win or lose, the prevailing rule mostly seems to have taken root long ago, without a great deal of thought being given until recently to policy questions of what attorney fee liability rule should govern and why. It thus makes sense to ask what main kinds of rationales should guide the choice of such a rule.

Without exhausting all the plausible types of arguments, let me suggest that three kinds deserve to be prominent: justice, incentives, and administrability. Many people start with a gut feeling that loser-pays is fair; the winner should not suffer for having had to spend to establish the rightness of a claim or defense. Moreover, when plaintiffs win damage awards, recovering fees—rather than having to pay their lawyers out of the recovery—brings them closer to getting the full compensation that the law means to give. But even losers often have fairness arguments against having to pay both sides' fees, because many cases are close enough that it is reasonable for both sides to take them to trial. With such variable influences as jury sympathy and lawyers' skills, we cannot assume that everyone should have been able to foresee the result and the eventual loser should have known better. As Justice Cardozo once said, "I have seen enough of the judicial process to know its imperfections. I would not lay too heavy a burden on the unsuccessful litigant."

Another way to put it is that loser-pays, at least in pure form, amounts to strict rather than fault liability: whether or not we think you were unreasonable about insisting on your right to trial, if you lose you suffer not only the judgment on the merits against you but must pay what it cost both sides to get the verdict. The loser-

pays rule works as an especially harsh form of strict liability when costs are likely to be highest and the loser's conduct most reasonable—in closely contested cases. (The sponsors of H.R. 10 share a suspicion of strict liability in another context, as section 103 of the bill would mostly limit the product liability of product sellers to cases involving fault or express warranty.)

Further, as ethical codes now stand and as H.R. 10 is now drafted, loser-pays fee liability would fall on the client and not on the lawyer. Some clients such as poor plaintiffs may be judgment-proof, making the loser-pays rule ineffective. With middle class claimants who have plausible claims that are short of sure things, the rule may be all too effective, as such people may be highly reluctant to risk even a fairly small chance of not just going away empty-handed but ending up in the hole. Thus loser-pays fee liability may be easier to defend in some contexts where both sides will usually be well financed, such as commercial contract litigation; Arizona has the loser-pays rule for such cases.

To turn from fairness to incentive considerations, it helps to distinguish between the likely effects of attorney fee liability rules on, first, whether people pursue claims in the first place and, second, whether and how cases settle or go to trial once a claim is pursued. Empirical research on the actual effects of fee liability rules is difficult and scarce, but legal academics and economists have enthusiastically churned out a great deal of theory. To give a brief summary, some of the main effects on pursuit of claims expected from loser-pays fee shifting are: 1) discouragement of "nuisance" claims—although it is not clear how widespread the nuisance-claim problem is, because contingent-fee plaintiffs' lawyers usually have a strong incentive not to take on likely losers; 2) encouragement of strong small claims, which are not worth pursuing under the American rule—although this effect of loser-pays seems of limited relevance under H.R. 10, because it applies only to cases involving claims for over \$50,000 to begin with; and 3) discouragement of reasonably strong but not clearly winning claims of people with modest means, who are likely to be "risk averse" and strongly deterred by a significant threat of down-side liability.

The likely effects of attorney fee liability rules on parties' decisions to settle or go to trial are hotly debated. Perhaps the point that deserves most emphasis is that it is essential to consider the impact of a possible fee shift on both sides' settlement incentives, which can make predictions complex. Just because a defendant with a weak defense and facing fee liability will likely be eager to settle, and for more than under the American rule, does not mean that settlement is automatically more likely. The probability of winning not just damages but fees means that the plaintiff with a strong claim can hold out for more, and the parties may be at least as far apart as under the American rule. A useful if rough generalization may be that loser-pays may strengthen the bargaining position of those who feel able to bargain hard, either because they are well financed or because their case is very strong. That effect can make settlement less likely in a case involving well-financed parties who disagree about the probable outcome already, or more likely if the threat of an adverse fee shift plays on the risk aversion by weakening the bargaining position of a middle-class plaintiff with less than a sure winner.

The final type of factor I mentioned for choosing a fee award rule was administrability. Whatever its defects, the American rule has the virtue of saving courts from having to spend time ruling on fee award amounts. Applying the common "lodestar" formula—a reasonable hourly rate times the hours reasonably expended on successful claims—often leads to complex and costly second rounds well after the merits are concluded. Better ways may exist, but they have yet to find widespread acceptance here. Percentages of recovery are simpler and correspond to present contingent fee practice; yet they could be excessive with very large recoveries, inadequate in cases of obstinate resistance to a small claim, and beside the point for cases involving non-monetary relief or defense victories.

Issues of fee award administration bring me to brief mention of two recent state experiences with loser-pays fee shifting. Florida had it for medical malpractice cases from 1980 to 1985, at the behest of doctors who saw it as protection against frivolous claims. The medical organizations quickly came to support its repeal when many fee awards proved uncollectible—except for those against losing doctors, which were sometimes startlingly large. One law review article reported that the law was regarded as "ineffective to prevent suits or encourage settlements."¹ A leading empirical study of the Florida experience concluded that it had probably had some net

¹ F. Townsend Hawkes, *The Second Reformation: Florida's Medical Malpractice Law*, 13 Fla. St. U. L. Rev. 747, 766 n.94 (1985).

deterrent effect on claims, but had also led to fewer settlements and more expensive trials in cases that did get pursued.²

Alaska has long been the sole general exception to the American rule, with fee liability established by statute and award schedules written into state court rules. The state has kept its loser-pays system, but with considerable grumbling and a recent major revision that reduced the percentages of winners' fees for which losers can be held liable. A survey that preceded the rule revision found wide divergences of opinion among lawyers not only about the desirability of the basic rule but over its impact on such key points as pursuit of medium-strength claims.³

III. SPECIAL FEATURES OF H.R. 10

Not all loser-pays rules are identical. The foregoing summary of major issues concerning attorney fee liability has spoken in general terms, saving for now any consideration of the particulars of H.R. 10's loser-pays proposal for diversity cases. Three features or effects of the provision seem worth special emphasis: 1) the limit on fee liability to the amount of one's own fees, with provision for reckoning a proxy amount when losing plaintiffs had contingent fee arrangements with their lawyers and hence incurred no fee; 2) its applicability to cases filed in the diversity jurisdiction, but not to cases filed in state court and removed by defendants on the basis of diversity; and 3) its phrasing that would probably keep Rule 68 offers of settlement from affecting fee as opposed to cost liability. This last feature would make entitlement to a fee award turn on the determination of liability on the merits, leaving the amount of damages recovered irrelevant except to the court's discretionary reduction or denial of a fee award.

First, subsection 2 of the loser-pays provision, proposed 28 U.S.C. § 1332(c)(2), would limit the loser's fee liability to the amount of the loser's own fees. This cap seems a reasonable accommodation to avoid what could be very harsh effects if, say, a plaintiff of modest means opposed a large company that invested heavily in expensive defense lawyers. The limit does, of course, dilute the deterrent impact of the loser-pays rule; in effect, for amounts over the plaintiff's likely fee, the cap reinstates the American rule. It thus remains possible for a plaintiff to bargain for a nuisance settlement by pointing to the unrecoverable fees a defendant may have to incur. This result may be the least of the available evils, but it does reduce just how much can probably be claimed for the bill's likely reduction of nuisance litigation.

Second, the core provision in subsection 1 makes the loser-pays rule applicable when a federal district court "exercises jurisdiction in a civil action commenced under this section"—28 U.S.C. § 1332, the statute establishing jurisdiction for state citizen diversity, alienage, and foreign-state-as-plaintiff cases. (The Subcommittee might wish to cut out the foreign-state-as-plaintiff cases brought under 1332(a)(4), because the present bill seems to create an arbitrary distinction between those cases and foreign-state-as-defendant actions under 28 U.S.C. 1330.) From the text of subsection 1, it appears that the loser-pays rule is to govern when plaintiffs file diversity cases, but not when they sue in the courts of a state that follows the American rule, whether or not the defendant removes to federal court. This approach does make some sense and may be the best available; making plaintiffs strictly liable for defendants' fees when they filed state law cases in the courts of a state that follows the American rule, but the defendant removed to federal court, could be extremely harsh.

This difference in fee rule depending on filing in state or federal court creates a unique choice for plaintiffs counsel. Most loser-pays rules are hard to escape; an English plaintiff cannot avoid the rule by filing in Wales. H.R. 10's loser-pays rule for diversity cases, though, would let plaintiffs pick the applicable fee liability rule, by choosing whether to file a case involving diverse parties and a claim over \$50,000 in federal or state court. The proposal in H.R. 10 seems to proceed from a concern for excess mainly on the plaintiffs' side; it implements a plank in the Contract with America that refers to "excessive legal claims" and "frivolous lawsuits," while there are such things as frivolous defenses as well—which the Contract does not mention. Yet the effect seems to be a plaintiff's dream; as a plaintiff's lawyer, I would feel about this loser-pays rule like Br'er Rabbit about the briar patch.

The calculations for plaintiffs and their lawyers seem straightforward: File very strong claims in federal court and lock in the probability of a favorable fee shift. File "iffier" but still plausible claims in state court and be protected against the

²See Edward A. Snyder & James W. Hughes, *The English Rule for Allocating Legal Costs: Evidence Confronts Theory*, 6 J.L., Econ., & Org. 345 (1990).

³See Kevin M. Kordziel, *Note, Rule 82 Revisited: Attorney Fee Shifting in Alaska*, 10 Alaska L. Rev. 429 (1993).

chance of having to pay the defendant's fees, even if the defendant removes to federal court. The result would be not to "stop . . . frivolous lawsuits" but, when they do get brought and pursued, to divert them to state court—with no guarantee they would not end up back in federal court. To the extent that cases filed in state court did not get removed, the federal courts would probably see a diversity docket somewhat richer in claims that were strong on liability. That would not necessarily mean, though, a higher settlement rate because plaintiffs entitled to a fee shift could hold out for good settlements—and also because major disagreement could still exist on amounts of damages.

This choose-your-rule-when-you-choose-your-court feature has some side effects. A usually fairly minor although unfortunate one could be races to the courthouse: if both sides to a prospective suit have claims against each other and see their chances of success differently, they could scramble for the advantage of picking the fee rule by filing first. A second implication is that H.R. 10's loser-pays rule would not afford a clean experiment in the workings and effects of such rules, because the selection possibilities would skew the samples of cases that were and were not under the rule. An experiment it would be, but with a form of loser-pays so unusual as to make it hard to derive answers to some of the most important questions about such rules.

Third, the bill as drafted speaks of an award of "an attorney's fee," without using the talismanic words "as part of the costs" which appear in some other federal attorney fee award statutes such as the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. 1988. Under *Marek v. Chesny*, 473 U.S. 1, 7–11 (1985), this omission makes it appear that Federal Rule of Civil Procedure 68 on offers of judgment will not affect fee liability under the proposed 28 U.S.C. 1332(e) as drafted. A defendant's Rule 68 offers would thus not stop the clock on the fee entitlement of a plaintiff who rejected but did not improve on the defense's offer, although the court might exercise its discretion under subsection 3 to reduce or deny a fee award in such a case.

This inapplicability of Rule 68 to H.R. 10's loser-pays fee shifting would mean that fee liability under subsection 1 would remain tied to the result on liability on the merits, unaffected by the outcome on damages. The distinction may sound technical, but the practical effects could be worrisome. Some cases are strong on both liability and damages, while others are weak on one or the other or both. The filtering incentives created by H.R. 10, with plaintiffs at least sure of no fee shift against them if they win on liability, would attract plaintiffs to file in federal court cases that are strong on liability—whether they are strong or weak on damages.

No one is likely to object if the rule works as a magnet for cases that are strong on liability and damages, but the paradigm of a case that is strong on liability and weak on damages is a whiplash claim. Plaintiffs' counsel with a rear-end collision case that is a sure thing on liability, while questionable on substantial damages but able to support a good faith initial claim for over \$50,000, could see nothing to lose as far as fee liability was concerned by filing in federal court. Neither state court with the American rule, nor federal court with loser-pays, would threaten an adverse shift when liability is certain; but federal court would offer the chance of a favorable shift that is unavailable in the state forum.

IV. ALTERNATIVES

A principal problem with loser-pays fee shifting as a response to perceived problems of "excessive legal claims, frivolous lawsuits, and overzealous lawyers" is that it threatens the frivolous and the non-frivolous alike. In most forms it also threatens the clients, not the lawyers. We do have problems with frivolous claims—and frivolous defenses—and we need to deal with them. My first preference is for approaches that aim more closely at the perceived abuses and abusers. That is precisely what the framers of the Federal Rules of Civil Procedure have been trying to do with the forms of Rule 11 adopted in 1983 and 1993.

I was not a member of the Advisory Committee on Civil Rules when it proposed what became the 1993 amendments, with their controversial limits on the sanctions process as it had stood under the 1983 version. All I will say now is that the 1993 changes were the product of especially careful consideration, that they aimed at cutting back on severe "satellite litigation" problems that had arisen under the 1983 version, and that the amendments drew perhaps surprisingly broad if not unanimous support from the bar. They still permit sanctions against attorneys and law firms, which H.R. 10's loser-pays provision does not. The 1993 changes apply to all federal court civil litigation, which the diversity proposal in H.R. 10 does not. I urge you to give these important and still new amendments a chance to work before changing them or adopting other and more drastic measures.

If some step beyond letting new Rule 11 prove its worth (or lack thereof) is felt necessary, rather than loser-pays you could consider an enhanced form of present

Rule 68 on offers of judgment. The rule now lets defendants make formal settlement offers; if the plaintiff rejects the offer and does not win a more favorable judgment, the rule makes the plaintiff liable for the defendant's post-offer "costs"—which do not usually include attorney fees. Largely because of this limited effect, the rule has seen relatively little use. Thoughtful proposals, however, have been made to make it more effective, most notably in recent years by Judge William Schwarzer, Director of the Federal Judicial Center.⁴

Briefly, the Schwarzer proposal would let either plaintiffs or defendants make Rule 68 offers. Rejecting an offer and not improving on it at trial would make the rejecting party liable, subject to certain limits, for the offeror's post-offer attorney fees. Thus a defendant facing a very weak claim could make a low, early offer with teeth—take this limited amount and go away, or you may be on the hook for some of the fees I have to pay to fight you. The plaintiff with a strong claim could make a parallel, effective threat to an obstinate defendant. Such a rule could smoke out serious settlement offers and might get some cases settled earlier, although its net effects on settlement are complex and uncertain. It would also get away from H.R. 10's problem of tying fee liability to outcomes on liability on the merits, shifting it instead to damage results, and would apply to most federal civil litigation and not just originally filed diversity cases.

I should not oversell the idea of an enhanced Rule 68. While I have been on the Advisory Committee on Civil Rules we have considered the Schwarzer proposal and seen many complexities, and have also thought it might be inappropriate for us to propose because of possible effects on substantive rights. But I do regard the rapiers of Rule 68, and amended Rule 11, as more promising avenues for dealing with litigation excesses than the broadsword of H.R. 10's loser-pays rule. I urge you to think seriously about these alternatives before you go ahead with the proposal before you.

STATEMENT OF PROF. HERBERT M. KRITZER, DEPARTMENT OF POLITICAL SCIENCE, UNIVERSITY OF WISCONSIN

MR. KRITZER. Mr. Chairman and members of the committee, counsel, I am a professor of political science and law at the University of Wisconsin. Over the last 15 years, I have been actively engaged in research and writing on a variety of aspects of the civil justice process both here in the United States and in other common law countries. This has given me the opportunity to observe and analyze the English rule as it actually works in practice rather than speculating on it from a theoretical perspective.

The key problem with the English rule is nicely summed up by the comments of the eminent English judge and legal commentator Lord Devlin. "Every citizen knows, every lawyer particularly knows, that for the ordinary citizens, subject to the cost rules, a lawsuit is quite out of the question. That citizen must take what is offered to him and be glad that he got something."

Professor Rowe, in some of his writings noted the same point. "The English rule seems highly likely to discourage the pressing of claims and defenses by those of modest means." By modest means, Professor Rowe is thinking of what we commonly call the middle class. Because of the serious problems created by the English rule, most common law jurisdictions that use it have in place the methods to mitigate those effects.

At one level, most countries provide alternative sources of loss compensation through national health care, attendance benefits and the like, which we in the United States have chosen not to provide. At another level, those countries have shielded large numbers of claimants from the English rule through a variety of institutional mechanisms such as legal aid and several insurance-like systems.

⁴William W Schwarzer, *Fee-Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation*, 76 *Judicature* 147 (1992).

That is in practice the English rule, as it is used by the English, is not a simple losers-pay proposition. It would be best to describe it as a "some-losers-pay system." Unfortunately, the actual threat of having to pay in practice falls most heavily on the potential litigant of moderate means. The result is that this group, which is the most discouraged from pursuing, leave aside strong justifiable claims it might otherwise pursue.

One might be tempted to say that someone with a very strong claim would pursue it under the English rule because that person would have little to fear and more to gain upon winning. However, consider the following thought experiment. You are a plaintiff's lawyer and John Smith comes to your office after his 12-year-old son was hit by a motorist who exited a parking lot without seeing Smith's son, who was riding a bicycle on the sidewalk as permitted by local ordinance. The boy suffered a broken arm and internal injuries.

You estimate the damages at \$15,000 to \$20,000. You tell Mr. Smith that this is a strong case, a very strong case, that if it gets to a jury, there is a 90-percent or better chance that you will win. You might think that it is essentially a sure thing, but as a conscientious lawyer, you are probably going to play it down a little bit because you never know what a jury will actually do.

You tell Mr. Smith that if it does go to trial and God forbid the jury finds for the defendant, he, Mr. Smith, will have to pay \$10,000, maybe \$20,000 to the defendant's insurance company in fees. Do you really think that most middle income people, on hearing that they might have to pay \$10,000 or \$20,000 to the insurance company of the other side, are going to be willing to pursue the case?

The problem here is that for the insurance company, the loser-pays rule is essentially a cost of doing business. For the one-shot plaintiff, however, such as Professor Rowe, me or the hypothetical Mr. Smith, the English rule is a real threat, particularly if they have \$20,000 or \$30,000 or \$40,000 put away in a bank account to pay for the college education of our son.

When potential litigants are equal in resources, the threat of the losers-pay rule falls equally on both sides. When there is a major resource disparity as is true in most litigation in the United States, the weaker party is further disadvantaged by this rule.

Let me briefly make two additional points which I discuss in my statement. First, there is a whole host of administrative problems presented by the rule: What hourly rates are appropriate, when does the clock start running—the apparently simple language of the bill opens up a hornet's nest of litigation that would probably make the satellite litigation that arose over the sanctions provision in rule 11 look like a drop in the bucket.

Second, the ostensible purpose of the proposed rule is to discourage frivolous litigation. We have all heard the horror stories and some of those stories are real. At the same time we know absolutely nothing about the relative frequency of such cases. Regular participants in the civil justice system all have their favorite stories to tell, examples of frivolous cases, discovery abuse and the like. Every effort to systematically identify or locate cases by taking scientific samples from court records have been unsuccessful.

This leads me to the expectation that the proposed rule will discourage many more meritorious cases than it will frivolous cases.

What is the tradeoff between discouraging 100 Mr. Smiths from seeking compensation and preventing 1 or 2 or 10 cases such as the now-fabled McDonald's coffee case?

Thank you.

[The prepared statement of Mr. Kritzer follows:]

**PREPARED STATEMENT OF PROF. HERBERT M. KRITZER,
DEPARTMENT OF POLITICAL SCIENCE, UNIVERSITY OF WISCONSIN**

My name is Herbert M. Kritzer. I am Professor of Political Science and Law at the University of Wisconsin. My training is as an empirically-oriented political scientist. My research speciality is the civil justice system, both here in the United States and in other common law countries. Over the last fifteen years I have published extensively drawing on my own and others empirical research on the day-to-day workings of civil justice processes. This writing includes two books on civil litigation in the United States, a forthcoming book which includes an extensive discussion of legal processes in England, and articles on topics such as Rule 11, adult guardianship procedures, the English Rule, fee arrangements, propensity to sue in the United States, England, Canada, and Australia, and notifications procedures in mass torts. My two current research projects focus on alternative forms of representation and on the American contingent fee. Also, I currently serve on an advisory committee to the Alaska Judicial Council which is in the midst of an in-depth study of Alaska's version of the English Rule (Rule 82).

I appear here today to testify in opposition to the adoption of what is commonly called the "English Rule."

Substantive Introduction

Periodically reformers and critics of the American civil justice system call for the adoption of what is customarily called the "English Rule":¹ the principle that the costs of a law suit for both

¹Prior to the current Bill, the most prominent recent example was Vice President Dan Quayle who endorsed a proposal equivalent to that contained here: President's Council on Competitiveness, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (see also H.R. 4155 or S.2180, the bills introduced in the House and Senate to implement the reports proposals).

sides are borne by the loser ("the loser pays"). H.R. 10 which the Subcommittee is currently considering is the most recent incarnation of that proposal.

Some proponents justify their support for what is technically called "cost (or fee) shifting" or "indemnity for costs" on the grounds of fairness, while others view it as a vehicle for discouraging frivolous or questionable litigation. Opponents of cost shifting charge that the English Rule inhibits individuals with meritorious claims from seeking the compensation to which they are entitled. Surprisingly, no one has taken the time to look at how cost shifting functions in jurisdictions that embrace the indemnity principle. For example, even a minimal investigation into the working of the English Rule in England would reveal that many litigants are shielded from either the costs or the benefits, or both, that the indemnity principle theoretically creates. In my testimony, I briefly describe the English cost shifting system in operation,² discuss extant research concerning its impact on litigants, and describe key issues that need to be considered in debates over applying the indemnity principle to the American civil justice system.

The English Rule in Operation

The theory of the English Rule (or, to use English parlance, "the rules regarding costs") is uncomplicated: whichever side prevails in a legal action is entitled to recover its reasonable litigation expense—court costs, legal fees, and other expenses such as the fees of expert

²The United Kingdom has three distinct legal systems: England and Wales, Scotland, and Northern Ireland. My references to the "English" system refers to the system in operation in England and Wales.

witnesses—from the losing side.³ The definition of "reasonable legal expense" is relatively straightforward because there is a well-established set of norms as to what various aspects of legal representation should cost.⁴ If there is any question about how much the loser should pay toward the winner's expenses, the amount is set by an officer of the court (the taxing master in the High Court, or the district judge in the County Court where smaller cases are handled⁵).⁶ While the system for determining the costs to be shifted operates essentially as described, the application of the indemnity principle itself is much more complicated than the simple phrase "loser pays" implies. While most defendants, who tend to be institutional actors (either as named defendants or as the insurer of an individual defendant), are genuinely at risk to pay costs if they lose, this is not true for plaintiffs: the variation in operation is closely linked to the mechanisms potential plaintiffs use to finance litigation. One result is that in many situations a successful defendant will not be able to recover its litigation expense.

³In England, the norm is that costs are paid even in settlements (regardless of whether or not a formal court action is even filed); the typical settlement agreement includes a statement as to what costs will be paid—See Genn, *HARD BARGAINING: OUT OF COURT SETTLEMENT IN PERSONAL INJURY ACTIONS* (1987) at 161 for an example. In contrast, in Ontario, the issue of costs is treated as more a part of the settlement package; see Kritzer, *Fee Arrangements and Fee Shifting: Lessons from the Experience in Ontario*, 47 *LAW AND CONTEMPORARY PROBLEMS* 125 (1984) at 135.

⁴Actually there are multiple standards concerning costs; fee shifting normally applies a standard called "party and party costs" (i.e., costs as between one party and another party). This is a lower level of costs than is sometimes actually billed to a client by a solicitor (which, in England is called common fund costs), which includes all costs which an attorney should reasonably be able to bill to his or her client. The highest level of costs is called "solicitor and own client" costs, which includes all costs which were incurred with the express or implied authorization of the client. See Genn, *supra* note 3 at 84. The existence of standardized fees goes back at least 200 years in England; see Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 *LAW AND CONTEMPORARY PROBLEMS* 9 (1984) at 12.

⁵Jackson, *THE MACHINERY OF JUSTICE IN ENGLAND* (7th Ed., 1977) at 520.

⁶In general, wherever a "loser pays" rule routinely operates, there are both well accepted standards of what the costs of prosecuting or defending a lawsuit should be and procedures for resolving disagreements about what costs should be paid by the loser. For example, in Ontario there is a procedure quite similar to that in England; see Watson, Bogart, Hutchinson, Mosher, and Roach, *CIVIL LITIGATION: CASES AND MATERIALS* (4th ed., 1991) at 423-424.

The fraction of plaintiffs in England who confront a straight-forward cost shifting situation are those who are "privately funded": they must pay their own solicitors (often, on account, as the action progresses), and are at risk for having to pay the other side's solicitor if an action is unsuccessful. If the litigation is successful, privately-funded plaintiffs are entitled to recover most of their expenses from the losing side. While there is no formal contingent (or percentage) fee system, there is an informal (usually unspoken) quasi-contingent fee system whereby an unsuccessful plaintiff's solicitor does not seek to collect a fee from his or her own client;⁷ but even in these situations, the unsuccessful litigant must expect to pay the winner's costs.

The impact of the English Rule for privately-funded litigants is generally accepted as one that discourages *meritorious* claims from being brought forward. For example, Patrick Devlin, a distinguished English judge, observed, "Everyone knows, every lawyer particularly knows, that for the ordinary citizen unqualified for Legal Aid [see below] a lawsuit is quite out of the question."⁸ The leading civil procedure text for Ontario practice (the Canadian province with a cost regime most similar to England's) asserts, "our costs system means that in litigation the 'downside risk' [the costs of losing] is always substantial and its undoubted effect is to discourage much litigation including some that should go forward."⁹ In fact, at least in court actions involving personal injury, only

⁷Genn, *supra* note 3, at 109-110. Similar practices appear to exist in Ontario, where contingent fees are also forbidden; see Kritzer, *supra* note 3, at 130-31. Unfortunately, there is no information on the frequency of such practices in either England or Ontario.

⁸Devlin, *THE JUDGE* (1979) at 69.

⁹Watson, Bogart, Hutchinson, Mosher, and Roach, *supra* note 6, at 419; see also Kritzer, *supra* note 3, at 136. One of the authors of this text related to me a personal experience that demonstrates this. He had contracted to sell his house in Toronto, and purchased a new house. Between the time the contract to sell was signed and the closing, the real estate market turned extremely soft, with rapidly falling prices. At the closing, the buyer informed the seller that he would pay \$20,000 less than the originally agreed to price. The seller felt compelled to accept the offer because otherwise he would have been left holding two houses, and could not afford either the risk of not being able to find another buyer or the 8-12 months it would take to get an order for specific performance. After the closing, the seller

around 40% of English plaintiffs are subject to the downside risk of the English Rule:¹⁰ the majority of plaintiffs avoid that risk through one of three means.

Persons whose incomes and assets fall within the appropriate guidelines are eligible to have their legal expenses paid by Legal Aid;¹¹ some persons are required to pay part of the cost, but most of those who qualify pay little or nothing.¹² According to one study, 28% of personal injury plaintiffs receive legal aid.¹³ "Legally aided" litigants are not subject, except in rare cases, to the risks of the English Rule (i.e., they are not at risk for the other side's legal costs). Outside of matrimonial cases, most litigants receiving civil legal aid are plaintiffs (or potential plaintiffs) confronting an institutional defendant; in a case where one side is legally-aided and the other side has substantial resources, the latter side cannot recover its legal expenses even if it prevails (the justification is that these winners are better able to bear the expense than is the Legal Aid fund).

discussed with his lawyer the possibility of filing suit for economic duress. The lawyer advised him that such a suit would have at most a 50-50 chance of success (the defense being consent), and laid out the following economic calculation: if he won the full \$20,000, he would net about \$16,000: total legal fees (solicitor and client costs) would be about \$8,000, half of which would be recovered as party and party costs from the other side; if he lost, his own solicitor would charge only \$5,000, but he would also have to pay \$4,000 in party and party costs to the other side (i.e., he would be out \$9,000). The buyer decided it wasn't worth a \$9,000 risk to try to get back \$16,000.

¹⁰ in a report to the Lord Chancellor's Department, INBUCON found reported on sources of financial assistance for personal injury litigants; the category "None or Unknown" was reported as 42%; see *Civil Justice Review: Study of Personal Injury Litigation* (1986) at 31. Because of sharply declining eligibility for legal aid, this figure may be higher now than it was a decade ago—eligibility for legal aid in personal injury claims fell from 81% of households in 1979 to 51% in 1990; see *The Times*, March 28, 1991, p. 5.

¹¹ As pointed out by Stephen Gillers, American proponents of the English Rule never take note of the much more extensive system of legal aid that exists in England; see *Justice or Just Us? The Door to Dan Quayle's Counthouse Only Swings One Way*, ASA JOURNAL 109 (June 1992).

¹² In 1984-5, less than 3% of those receiving Legal Aid had to pay a contribution of £500 or more; *Improving Access to Civil Justice*, Supplement to the Law Society's GAZETTE (8 July 1987), at 4.

¹³ INBUCON, *supra* note 10 at 31.

The other common way by which litigants avoid the downside of the English Rule is by having their trade union take on the risks. Union-funding of litigation is generally limited to accident claims, most often work-related (though many unions provide funding for injuries occurring outside the work setting). About 29% of accident cases are pursued on behalf of members by solicitors retained by the victim's union.¹⁴ If the claim is unsuccessful, the union pays both sides' legal expenses; if the claim is successful, the claimant's solicitor is paid by the other side.¹⁵

The last method of avoiding the risks of the English Rule is through some type of legal expense insurance. At present, this is relatively rare—only about 2% of all cases are pursued by persons with this type of insurance.¹⁶ Nonetheless, having such insurance makes a significant difference in how a solicitor handles a case,¹⁷ primarily because the client does not have to be concerned about costs, either those of his or her own solicitor or those of the other side.

The Impact of Being At Risk for Costs

There are a number of specific pieces of evidence that suggest the impact on plaintiffs of being at actual risk for costs. The division of the legal profession between solicitors and barristers provides the first indication. In England solicitors are responsible for most of the pretrial preparation of a case and barristers are responsible for presenting the case at trial. Barristers

¹⁴ *Id.*

¹⁵ The solicitors who are retained by the unions are generally regarded as extremely effective, in no small part because they do not have to worry about a skittish client who is afraid of having to pay out substantial sums if the litigation is unsuccessful: see *Genov.* *supra* note 3 at 113.

¹⁶ INBUCON, *supra* note 10 at 21.

¹⁷ See Kertzer, LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION (1991) at 109-110.

typically do not become involved in a case until a trial date is approaching. Recall that around 40% of personal injury litigants are privately-funded. Nonetheless, the perception of barristers is that "it was very rare for a plaintiff to be privately-funded."¹⁸ This can only mean either that privately-funded litigants are more likely to get and accept an early settlement offer from the other side or that they are more likely to abandon their cases if a settlement offer is not forthcoming. While early settlements may be in response to generous offers, it is more likely that individual plaintiffs are inclined to accept whatever is offered to escape the risk of costs: to quote Patrick Devlin again, the unassisted litigant citizen "must take what is offered to him and be glad that he has got something."¹⁹

Research on negotiation and settlement in England gives strong backing to Devlin's observation. "Repeat player" defendants take advantage of the risk aversion of privately-funded, "one shot"²⁰ plaintiffs by engaging in what one writer describes as "hard bargaining"; the defendants either refuse to make offers at all, or make offers considerably under the true value of the case.²¹ The gap between the proportion of injury *claimants* who are unassisted, which has been estimated as something over half (probably in the range of 55%)²² and the proportion of *litigants* who are unassisted which I previously noted was around 40% indicates that unassisted plaintiffs are less likely to pursue their claims vigorously. A study of settlement negotiations in 220 High Court cases

¹⁸Genn, *supra* note 3, at 110.

¹⁹Devlin, *supra* note 3.

²⁰Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOCIETY REVIEW 95 (1974).

²¹Genn, *supra* note 3.

²²*Id.* at 110.

adds further support to this conclusion:²³ in only 53% of the cases in which the plaintiff was privately-funded did the defendant make an offer of settlement, compared to 66% for plaintiffs who were legally-aided and 90% for those whose cases were financed by a trade union. This suggests that repeat player defendants use concerns about costs that one-shot plaintiffs usually have as a strategic bargaining tool.²⁴

The American Experience with the English Rule

There is in fact at least some experience with the English Rule in the United States. A version of the English Rule, now referred to as Rule 82, has existed in Alaska since the 19th century.²⁵ Alaska's rule provides only partial fee-shifting, which for plaintiffs is calculated as a sliding percent of the recovery and for defendants as 20-30% of the actual fees "necessarily incurred."²⁶ Surprisingly, no systematic research is available that assesses the impact of Alaska's Rule 82,²⁷ although such a study is now underway. Some preliminary tabulations from court records seem to show that Rule 82 is most often invoked in debt and eviction cases (40-60% of such cases).

²³This study examined cases that had been submitted to the Taxing Master for review of a claim for costs. This research, conducted by Timothy Swanson of the Economics Department at University College London, is described in Kritzer, *supra* note 17 at 93-94.

²⁴The impacts are particularly strong when litigation has been initiated: a second unpublished study reported in Kritzer, *supra* note 17 at 97 (by Paul Fenn of the Centre for Socio-Legal Studies, Wolfson College, Oxford), shows that the likelihood of an offer being made to a privately-funded claimant (i.e., this study consisted primarily of personal injury claims which did not lead to litigation) was only slightly lower than for financially assisted claimants.

²⁵Kellej, *History of Rule 82*, Alaska Judicial Council Draft Memo (January 3, 1995).

²⁶ALASKA RULES OF COURT, Rule 82(b)(1)&(2).

²⁷For impressionistic discussions of the impact of the Alaska rules, see Kleinfeld, *Alaska: Where the Loser Pays the Winner's Fees*, 24 JUDGES' JOURNAL 3 (Spring 1985); Parrish and Whiting, *The Alaska Rules Are a Success*, 24 JUDGES' JOURNAL 12 (Spring 1985).

but only in a small proportion of tort cases (about 10% of those cases).²⁸ Impressions from the interviews with lawyers suggest that fear of having to pay the other side's legal fees is a deciding factor in proceeding with a case only for those clients who have assets that could be easily seized to cover a cost award against them: that is, it is the middle class, and upper middle class plaintiff with a bank account who appears to have the most to fear from the Rule. Large business clients view Rule 82 costs as simply a part of the cost of doing business, except in some extremely large cases (but in those cases concerns about prejudgment interest may be more significant than concerns about a fee award). The researchers indicate that Rule 82 does contribute to decisions not to pursue questionable cases, but, except as noted above, it appears to be primarily a contributing factor rather than a deciding factor, and for the middle class litigants with assets to lose it probably discourages moderately strong cases as well as weak cases.²⁹

To my knowledge, there is only one solid empirical study of the English Rule in operation in the United States. That study focused on medical malpractice litigation in Florida, which had a mandatory English Rule system in operation from June 1980 through September 1985. The analysis of the impact of the English Rule showed that it increased the likelihood that cases would be dropped, but also increased the likelihood that cases not dropped would go to trial; the English rule also led to an increase in the amount spent by defendants.³⁰ What the research was not able to determine was whether the increase in dropped cases reflected risk averse plaintiffs with meritorious cases, or weak cases that without the threat of the English Rule would have been pursued to

²⁸Tabulations prepared and circulated for Teleconference Progress Meeting, January 10, 1995.

²⁹Telephone conversation Susanne Di Pietro, Alaska Judicial Council, February 3, 1995.

³⁰Snyder and Hughes, *The English Rule for Allocating Legal Costs: Evidence Confronts Theory*, 5 JOURNAL OF LAW, ECONOMICS, AND ORGANIZATION 345 (1989) at 362.

settlement or trial. In fact, Florida repealed the English Rule in 1985, largely at the insistence of the Florida Medical Association, because the Rule in fact led to more cases being filed, and successful defendants found that they frequently were unable to recover there defense costs because plaintiffs were insolvent.³¹

Transplanting the English Rule to the United States

Transplanting the loser pays rule more broadly to the United States raises a number of important issues, some of which can be addressed by examining the operation of the Rule in England, and some which are only posed by other differences between the English and American systems. Let me address a number of these issues.

Mitigating the Disincentives of the English Rule

Would there be any provisions to mitigate the losers pay principle for segments of the population that would be particularly impacted by the Rule? In thinking about how an English Rule might work in the United States, Professor Thomas Rowe observed that the English Rule "seems highly likely to discourage the pressing of claims and defenses of those of modest means" ("middle income").³²

The extensive Legal Aid system in England provides a shield for one segment of the population; trade union funding provides a shield for another segment, and private legal expense insurance provides at least the potential of a shield for other segments. Legal assistance in the

³¹*Id.*, at 356.

³²Rowe, *Predicting the Effects of Attorney Fee Shifting*, 47 LAW AND CONTEMPORARY PROBLEMS 139 (1984) at 153.

United States is much more restricted than is Legal Aid in England; typically legal assistance is not available for cases that could be handled through contingent fees, and those kinds of cases are the primary target of the losers pay rule. Would the American system of legal assistance be modified in some way to provide protections of the sort the English system provides? In the area of personal injury cases, the absence of some type of shield, or other methods of mitigating the disincentives of the Rule (both with regards to bringing a claim initially, and pursuing a claim with enough vigor to secure a fair outcome) would create substantially more hardship in the United States because of the absence of the the kind of extensive social insurance system (national health insurance, disability programs, personal assistance benefits, etc.) that in England provide extensive sources of compensation outside the tort system.³³

But are the disincentives really all that great if a potential plaintiff has a strong cases? In fact, some have argued that a loser pays rule would actually enable persons to pursue strong claims that were not financially viable under the usual American percentage fee arrangement. A simple "thought experiment" casts doubts on this claimed benefit, and makes clear the deterrent threat of English Rule for individuals. Imagine a person of moderate means who has suffered a loss of \$5,000. You, as his (or her) attorney advise him that his case is very good—a 90% or better chance of winning if the case ultimately goes to trial; you might think that it is virtually a sure winner, but you would probably use the 90% figure because you never can be 100% sure how a jury will react to a case. Under the English Rule, you would also explain that if your side wins, the other side will have to pay his (your client's) legal expenses associated with the case; you would then also tell your client that in the unlikely event that the other side won the case at trial he (your client) would have

³³See Harris *et al.*, COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY (1984).

to pay the other side's legal fees which might come to \$10,000 or more. It is hard to imagine a typical risk averse, one shot player—the archetypical individual litigant—who would be willing to risk \$10,000 (even with only a 10% chance of having to pay out that amount³⁴) in order to recover a \$5,000 loss.³⁵ Even if the amount at stake were \$10,000 or \$25,000, most middle income individuals would be reluctant to put \$5,000 to \$10,000 on the line even if the chances of winning were very high.

To What Would the Rule Apply?

How would the Rule work in subparts of a case? The general principle that holds in common law systems using the English Rule is that "costs follow the event";³⁶ that is, at any point in which an adjudicatory decision is made, the costs associated with that decision are borne by whoever loses *that* decision. Earlier proposals specifically incorporated this for discovery disputes;³⁷ what about motions such as demurrers, motions to dismiss for lack of jurisdiction, motions for sanctions under Rule 11, or motions for summary judgment—i.e., the kinds of motions most often brought by the defendant, and which, if successful would terminate all or part of the case and thus

³⁴My thought experiment has not incorporated the prospect of settlement, which would probably increase the probability of recovery; because it is unclear how a losers pay rule would function under pending proposals if a case were to settle rather than go to trial.

³⁵In this example, a risk neutral repeat player would look at the risks and conclude that the *expected* outcome is a gain of \$400 ($.40 \times \$1,000 + .10 \times \$5,000$); thus, if anything, it would be the repeat player who would secure the advantage in the simple case situation, not the average claimant toward whom this point was pitched.

³⁶See Watson *et al.*, *supra* note 6, at 419.

³⁷See President's Council, *supra* note 1, at 19: "When the court decides a discovery motion, the losing party would pay to the winner the costs and attorney fees to 'indicate the prevailing position.'"

entitle the defendant to a fee award? Most summary judgment motions are unsuccessful;³⁸ would defendants who made unsuccessful motions for summary judgment be required to pay the plaintiff's expenses associated with opposing the motion (even if the defendant eventually prevailed)? Similarly, most Rule 11 motions by defendants are unsuccessful;³⁹ would defendants be ordered to pay the plaintiffs' costs in replying to such motions?

Would the losers pay rule extend to *all* reasonable costs incurred in prosecuting or defending a suit, including court fees, attorney's fees and expenses, and things such as expert witness fees? The American Rule includes only the first element in what is generally labeled "costs." The current proposal extends "costs" to include the second element. Jurisdictions using the English Rule typically include all three elements. Litigation involving medical malpractice or products liability in the United States is typically limited to cases involving very substantial damages: this reflects the costs of bringing such cases—particularly the costs of expert witnesses and related investigation—even when the evidence for liability is very strong. If "costs" included expert witness fees, one might expect a sharp increase in product liability and medical malpractice suits where damages were in the under \$50,000 range. Whether such an increase would occur would depend on whether some mechanism for handling the "downside risk" could be developed.

The Response of the Plaintiffs' Bar

What could the plaintiffs' bar do to mitigate the impact of the English Rule? Particularly in the area of smaller, routine cases, where liability could be assessed with a knowable degree of

³⁸See Cecil and Douglas, SUMMARY JUDGMENT PRACTICE IN THREE DISTRICT COURTS (1987).

³⁹Marshall, Kritzer, and Zemans, *The Use and Impact of Rule 11*, 86 NORTHWESTERN LAW REVIEW 943 (1992).

certainly, the plaintiffs' bar might be able to develop some type of mutual insurance system that would protect litigants from the downside risk associated with a case. Under a reasonably pure fee shifting system, the costs of legal expense insurance for individuals is generally quite modest because one is only insuring against the costs of losing (since the other side will pay legal expenses if the insured wins); these insurance systems employ case screening procedures that effectively remove the doubtful cases. If the English Rule were to be adopted here, one should expect entrepreneurs to develop similar schemes, perhaps including "post-incident" plans based on some percentage of the recovery; that is, plaintiffs might be asked to pay a higher percentage as insurance against having to pay the other sides' costs if they lost at trial.

In fact, one could imagine how a well-operating plan would lead to a sharply increased volume of litigation. Under the American Rule, the major barrier to litigation in modest cases is the contingent fee: it is not economical for a contingent fee lawyer to push modest cases to trial, or to pursue at all modest cases that require substantial time and resource investments (i.e., medical malpractice and product liability). Under an English Rule system, where the one shot, risk averse plaintiff had insurance against the costs of losing and where the lawyer was paid based on the "fee shift" if that exceeded the percentage of the recovery, plaintiffs' lawyers would be much more interested in pursuing large numbers of cases that are not economical under today's system.

In some ways, the key unknown is the proportion of cases in today's system that are totally lacking in merit. If in fact a significant proportion of cases filed are "frivolous," then the screening by the provider of the litigation insurance would lead such cases being discouraged (i.e., the insurer would decline to cover such case) because defendants who strongly believe they will win at trial will be more inclined to refuse to make settlement offers if they can recover their costs of going to

trial. On the other hand, if very few "frivolous" cases are actually pursued,⁴⁰ then there will be few such cases to be discouraged.

While proponents of reforms such as that being considered here regularly proclaim that there are large numbers of frivolous cases, there is little or no evidence, other than anecdotes, on the frequency of such cases. I regularly hear comments, such as that of Professor Rowe, "most lawyers with experience in the defense of civil cases—and that includes myself—would likely insist that there is some noticeable amount of nuisance litigation."⁴¹ No doubt nuisance litigation does occur, and when it does occur defense lawyers take note of it; but a "noticeable" amount could be ½%, 1%, 5%, or 10% of cases—it doesn't take much to be noticed, particularly for something that is in fact quite unusual. Claims about substantial numbers of unmeritorious lawsuits lack solid foundations. For example, last week's *U.S. News & World Report* made reference to the Harvard Medical Practice Study in New York, suggesting that most of the malpractice cases involving patients in that study were without foundation;⁴² in fact, the authors of the original study stated that "our lack of access to litigation files prevented any determination whether malpractice claims in the sample are non-meritorious [emphasis added]."⁴³ Overall, we lack any solid empirical base for making statements about the proportion of civil cases or damage claims that are frivolous.

⁴⁰In fact, I know of no evidence on what proportion of cases filed are arguably frivolous: the frivolous case debate is sustained primarily through anecdotes.

⁴¹Rowe, *supra* note 1, at 151.

⁴²*How Lawyers Abuse the Law*, U.S. NEWS & WORLD REPORT, January 30, 1995, at 56.

⁴³PATIENTS, DOCTORS, AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION IN NEW YORK (1990) at 7-1.

Regulating Fees

Administratively, one of the more complex issues with any type of losers pay rule is setting the amounts to be paid. There must be standards for appropriate activities, and for appropriate rates to be applied to the time to complete those activities. Should there be a single rate, or should rates vary depending upon the experience and reputation of the lawyer or depending on the nature of the case (e.g., size, complexity, riskiness, etc.)? The proposal submitted to Congress seeks to finesse one aspect of the costs equation by making one side's liability (in terms of time) equal to that same side's expenditure of time—if side A lost the case, its liability to side B would be limited to the amount of time that it spent on the case, multiplied times some hourly rate. This simple solution is fraught with difficulties: what constitutes the time spent on the case? Should it include time spent in settlement negotiations (what about settlement negotiations before the filing of a lawsuit)? What about the time of paralegals, how should that be counted (and what if work could have been done by a paralegal but a firm did not have a paralegal?)? The current bill makes no reference to hourly rates: should an unsuccessful plaintiff pay the high hourly rates charged by specialist medical malpractice defense attorneys? Significant litigation over the fee shifting standards seems inevitable.

Who will hear simple disputes over fees to be shifted? As noted previously, judges in England do not handle routine disputes over fees; such issues are handled by taxing masters or "district judges" (roughly equivalent to magistrates or court commissioners). However, fundamental issues of standards to be applied by these officials are set by case law established by appeals up through the judicial hierarchy, and even with these standards disputes over the fees to be paid by

the other side occur with regularity.⁴⁴ Recognized standards for activities in litigation, and for the levels of fees that can be charged, may have potential benefits, even in the absence of a fee shifting system: however, establishing such standards can not come without substantial costs, both to the system and to litigants themselves.⁴⁵ One of the key elements in the Rule 11 debate was that it generated substantial satellite litigation. The satellite litigation that would arise as part of a loser-pays system would make the Rule 11 litigation look like a drop in the bucket.

Summary and Conclusion

Proponents of the English Rule in the United States seem unaware of how the Rule actually operates in England. Rather than a simple "loser pays" principle, the Rule is embedded in a complex web of factors related to the financing of litigation. Many potential and actual plaintiffs are either excused from the threat of having to pay the costs of the other side if they lose, or are effectively insured against having to pay those costs. These variations have substantial implications for the operation of the English civil justice system, advantaging some players and disadvantaging others.

Little attention has been paid by either supporters or opponents of a loser pays rule of how such a rule might interact with other aspects of the American civil justice system. The most obvious is the percentage-based contingent fee system used by most individual litigants. I have suggested how, with appropriate insurance schemes, the English Rule could lead to an explosion of

⁴⁴In the words of one English solicitor commenting on the American interest in the English Rule, "The English Rule has also resulted in many additional hours of negotiation and litigation solely concerned with . . . issues of who should pay whom, and how much"; Napier, *For Many English Rule Impedes Access to Justice*, WALL STREET JOURNAL (September 24, 1992), at A17.

⁴⁵Presumably, costs associated with litigating cost issues would be subject to the loser pays rule.

litigation in areas where more modest claims have been precluded because of the expenses required to establish liability. The American civil justice system does not have in place standards or mechanisms for evaluating claims for costs; such mechanisms are essential for an indemnity system of operate with any type of efficiency.

From afar the English Rule looks to its supporters as a mechanism for dealing with what some have described as the overly litigious American. To its opponents, the Rule appears as a nightmare that will deny many victims their rightful compensation and put many lawyers into financial crisis. Consideration of both the Rule in operation in England and how the Rule would probably interact with the elements that define the American civil justice system suggest that these hopes and fears have some validity, but that a transplanted indemnity system might operate in fundamentally different ways in the United States.

Finally, while I have only briefly referred to the practical problems of operating a cost shifting system, these problems are significant. How will judges respond to the need to establish through extensive litigation the standards that will be necessary to set fees routinely? Simple solutions, such as limiting the amount at risk to a sides' own legal expenses,⁴⁶ are fraught with difficulties. For example, what constitutes the time spent on the case? Should it include time spent in settlement negotiations (what about settlement negotiations before the filing of a lawsuit)? What about time spent trying to deal with an ongoing problem that ultimately results in litigation? What about the time of paralegals, how should that be counted (and what if work could have been done by a paralegal but a firm did not have a paralegal?)? These questions, and many more, would have to be dealt with for a cost shifting system to operate smoothly and effectively.

⁴⁶This is essentially the proposal of the President's Council on Competitiveness; see the bills cited in note 1 *supra*.

Mr. MOORHEAD. One of the issues that has been brought up here relates to whether we are going to scare the plaintiff off filing suit if he doesn't have a perfect case or if he is poor, but the fact that he selects his own venue, he can file in a State court or if he claims diversity, he can file in a Federal court—wouldn't just about the same number of cases be filed under the new rule as it would under the old?

Are you really going to prevent a plaintiff from filing a case if he has the choice of whether he wants to be under the English rule or whether he wants to be under the system we have today?

Mr. KRITZER. That presumes that that choice remains. Most likely, if one venue, one jurisdiction begins to shift toward the English rule, others will do the same. That is, if in fact you could include in the statute a provision that said no State may adopt the English rule in order to preserve this option for the plaintiffs, that would make sense.

But one would expect that if under Federal jurisdiction the English rule were adopted, that would be the beginning of a large scale movement in the direction of the English rule among the State jurisdictions as well.

Mr. MOORHEAD. Except for that movement, you wouldn't expect there to be a reduction of cases filed?

Mr. KRITZER. If in fact plaintiffs had the choice of whether or not to pursue a case under the English rule or not, then probably not. I can't imagine that that would happen in the long run.

Mr. ROWE. If I may add to Mr. Kritzer's answer, I think we can be looking at this on two levels: One, the virtues and defects of the loser-pays rule in general. Usually where it applies, it is universally applicable, you can't get out from under it. An English plaintiff can't get out from under it by filing in Wales. The same rule governs. There is where you have the concern about discouraging claims so that the idea is if the loser-pays rule is generally applicable, that you may discourage many meritorious claims.

This bill implements the loser-pays rule in an unusual way such that the plaintiff is able to choose whether it applies when the plaintiff chooses the forum. That means that the rule, if adopted as in this bill, would probably not have the desired effect of discouraging frivolous claims. It would transfer them to State court because the incentive would be to file there where you don't have to worry about the loser-pays rule, with no protection against their removal to Federal court so they might even be back in Federal court.

One of the effects of this choice is that it is so unusual as a way of implementing the loser-pays rule that while enacting it would give us a very interesting experiment, it would not be an experiment in the general effectiveness of the English rule because of the selection effect that you would have. The cases would probably be skewed toward stronger ones at least starting out in Federal court, weaker ones not under the English rule, and that would create—perhaps not inseparable given methodological wizards like Professor Kritzer, but nonetheless significant—problems in trying to figure out what was the import of this experiment for more general use of the American rule. Nowhere else that I know of can you pick your rule when you pick your forum.

Mr. MOORHEAD. One of the things, as you know, that the Supreme Court has been trying to do as well as the justices of the various circuit courts in the Federal system is to reduce the number of cases that are filed in Federal courts. They are very concerned that acts of Congress have constantly been increasing the number of cases that are filed to the point that they feel that the Federal courts are being used in a way they shouldn't be used. That was an issue that came up with the Federal Court Study Committee. Would this not reduce the number of cases perhaps that were brought to the Federal court?

Mr. ROWE. It might somewhat, but very often these cases, even if filed in State court, because they are diversity cases, if the defendants are from out of State, they could still be removed to Federal court so the reduction might be fairly small. And for caseload reduction, it seems there are better ways such as raising the amount in controversy or even something as I believe you endorsed in the Federal Courts Study Committee report, Congressman, that is not on the agenda, which is abolishing the general diversity jurisdiction.

Mr. MOORHEAD. In the event defendants had it transferred to the Federal courts, neither side would be under this new English rule in this legislation?

Mr. ROWE. That is right.

Mr. MOORHEAD. One of the comments that you made dealt with the fairness of a plaintiff who had one of those cases that was about a 60-percent chance of winning but didn't, having to pay the whole cost. One of the things that is in this legislation is page 3, number three, notwithstanding paragraphs 1 and 2, the court in its discretion may refuse to award or may reduce the amount awarded as an attorney's fee under paragraph 1 to the extent the court finds special circumstances that make an award of attorney's fees determined in a court unjust.

Mr. ROWE. I think that is a saving grace. Often, of course, the important incentive effect is not what happens after the fact but what someone has to worry about when going in, and though it is important and I think a positive feature of the bill that includes the discretionary factor, it does mean that one can't be sure going in and could still face the kinds of discouraging effects that Professor Kritzer talked about.

Mr. OLSON. Some European systems maintain formal exceptions for some types of close cases recognized as such, cases that create new law, cases that are reversed on appeal, cases on which a panel of judges are split. It would be appropriate for us to consider such exemptions as part of the judge's discretion, but we might consider putting in specifics of that sort rather than leaving it to litigation whether appeal overturns are automatically entitled to a neutralization of the fee and that kind of thing.

Mr. MOORHEAD. Congresswoman Schroeder.

Mrs. SCHROEDER. Thank you, Mr. Chairman.

I want to thank the panel. To those on the first panel. I wanted to say to both of them, they both cited the McDonald's case but the way I understand loser-pays is McDonald's would have had to pay more, because McDonald's lost. So you can talk about the hot coffee case, but they would not only have had to pay the damages, but

also the plaintiff's attorney's fees, so I am not sure they were citing the right case to get where they wanted to go.

Counsel and I were thinking maybe we ought to rename this the "enhanced forum-shopping bill." One of the things that I took from your testimony that I found very interesting is, Mr. Rowe, you said Japan had the same rule but didn't crank out litigation the same way. Maybe it is something else that is driving litigation here, and if we enact this rule, we can't expect it all to suddenly be reasonable. If it is such a good idea, why haven't more of the States done it?

I understand just two of the States have adopted the English rule, and one has a large group trying to undo it, or did undo it. So I guess only one State, I guess Alaska, has it. So if it is such a good idea, why haven't more States done it, and aren't we also very concerned about the clogging of the State courts? So just to say this is how we dump it out onto the State courts with our enhanced forum shopping, I don't think we have gotten to where we want to go if your message is you want to reduce the number of litigants.

Mr. OLSON. It is true that Florida repealed its law shifting fee in medical malpractice. However, Arizona has kept its breach-of-contract fee-shifting, and Alaska, which is the big exception, changed but did not repeal its loser-pays. This ties in with what Professor Kritzer said, which is the Federal rules are taken as a beacon for State rules. The Federal examples is of great importance in the administration of the State systems. The States are very reluctant to step out in front.

And as Professor Kritzer predicted, should the Federal Government move toward the English rule, the strong constituencies that are already very interested in loser-pays around the country will probably take that as an opportunity to press for it.

The forum-shopping that the Congresswoman pointed out adds to the pressure toward uniformity. I suspect that we would see significant State movement. To me, this is among the most attractive aspects of this Federal initiative. I understand the two opponents feel.

Mrs. SCHROEDER. So you basically hope that if we pass this, there won't be the option for forum shopping in a short period of time.

Mr. Rowe, I really appreciated your observations about rule 68 and rule 11 because I think those are two rules and mechanisms that could be used very well to deter some of the frivolous suits that everybody would like to deter.

Why haven't the States and the Federal Government been able to use those rules better?

Mr. ROWE. If I could go back briefly to your previous question about the States not adopting the English rule, there has been a good deal of activity in the States to get away from the American you-pay-your-own-lawyer-win-or-lose rule. It has mostly been in the direction of one-way prevailing plaintiff rules, often with some modifications, to keep it from being too unfair to defendants.

So it is not as if the States haven't thought about this and made some changes. There are different directions in which they could go and often have gone. But I don't think I would—I don't think I

should spend further time on one-way rules because I think in the current political atmosphere, that would be a waste of time.

As for things like rule 11 and rule 68, rule 11 in the enhanced form adopted in 1983 in the Federal courts was adopted in a good many State systems. I know it has been adopted but not much about the experience under rule 11. So they were trying it. There are a few States with rule 68's having greater effects. It does have somewhat greater effect in the Federal system in civil rights cases where it can stop the clock on a plaintiff's fee entitlement if a defendant makes an offer that the plaintiff rejects and doesn't improve on.

The workings of such offer devices do get fairly complex when they get turned down, and it gets harder to reach settlement after that because people get dug into offers that they have already made. There has been work on this and a thoughtful proposal by Judge Schwarzer that came out recently that may deserve further consideration.

But I guess the short answer is that there has been some use of it, sometimes with some effect. It has enough problems that people are still trying to work out how do we make it work best and there is still effort going on there to try and get the kinks out.

Mrs. SCHROEDER. Thank you.

Thank you very much, Mr. Chairman.

Mr. MOORHEAD. Mr. Gekas.

Mr. GEKAS. I thank the Chair.

It occurs to me that the—looking at it from the standpoint of the insurance companies that would be involved continuously in whatever we finally adopt here in the Congress, if loser-pays prevails, isn't there a possibility that the insurance company which is covering product liability for a defendant industrial company, shall we say, would have to raise its rates almost immediately or create a new base of rates to take into account the possibility that the plaintiff would not only win damages but then the expenses and fees that are attendant to it—is that a fair assumption, or would they take into consideration the fact that given that there will be some cases where the plaintiff would have to pay the costs, that they could possibly reduce rates in a particular case? I don't see—I don't see that clearly.

Mr. KRITZER. The example in Florida in the medical malpractice arena would suggest that the cost ultimately to the insurers, the doctors and the insurers, are likely to be higher for two reasons: One, when they lose the case, they are going to have to pay the other side's fee; and two, when they win the case, a significant proportion of plaintiffs are going to be judgment-proof and they will not be able to collect their fee.

In Alaska, the greatest effect has been that the plaintiff with little resources is not deterred, apparently, at all because they have nothing to lose.

Mr. ROWE. And the further effect shown by the best empirical study is that probably while somewhat fewer cases may have been brought in Florida on medical malpractice, in the cases that were brought, they were more likely to go to trial rather than settle and the trials were more expensive. People fought them harder because of the higher stakes on fees. So we might not necessarily be cutting

expenses on litigation given the incentives created once you get past the point of filing.

Mr. OLSON. I hope we can somehow harmonize the different and opposing theories of which disaster will befall the country if loser-pays is enacted. On the one hand, we are told that it will choke off huge numbers of legitimate claims that currently go forward that no one will sue in a vast range of situations and those who do sue will have to take much smaller settlements. On the other hand, we are told there will be actually more litigation and the number of suits will go up.

The Florida experience I find important in harmonizing them. I gather that because of a combination of bad drafting and unsympathetic judicial administration, it was a botch, a disaster. The fees awarded to prevailing lawyers were extraordinary bonanzas not related to the actual number of hours they put on the case and seemingly meant to punish the doctors for having resisted. Meanwhile strong, small claims were encouraged, which up to a point is a desirable feature of a rule loser-pays. Unfortunately, once the strong small claims got into court, they were run by the lawyers for maximum hours because there was no mechanism of offer of settlement which could make the lawyer accept a reasonable settlement offer.

Without such a mechanism, the lawyer had a reason to take the case all the way to trial to maximize the fee award; hence the higher number of trials; hence the higher litigation costs. We should not encourage turning down of a good settlement if you are a plaintiff's lawyer, in our bill here, and I think we don't have to.

Mr. GEKAS. No, I am still trying to look at it from the standpoint of the premiums that have to be paid by people in business and in the professions, and there I thought that one of our goals was to try to reduce the cost of insurance to industrialists, to product manufacturers, to professionals, to reduce their premiums so that that attendant mitigation of costs could lead to lower health care costs, lower—

Mr. OLSON. All I ask is that we compare profession and profession, industry by industry, sector of economy by sector of economy: what do people pay in the United States for insurance against being sued and what do they pay in comparable industrial countries? When you look at those numbers, the amounts they pay overseas look like the rounding errors, the ultra digits dropped by the Intel chip, compared with the amounts we pay in this country.

Sometimes it is the same insurance companies insuring the same professions, doctors, accountants, whatever they may be. They pay drastically less than we do in those other countries. Maybe loser-pays is not the sole reason, but I think it is a crucial one and would argue so at length.

Mr. ROWE. The effect on costs and rates—it is hard to be sure because you have effects that do go in opposite directions, and the question is how strong are the effects in the opposite directions. Some claims might be deterred, some claims that should be, some claims that shouldn't be, from being brought in the first place.

Once they are in the door, then you have the question of the effects on how likely they are to go to trial as opposed to settling before trial; if they go to trial, how expensive are the trials; and then

if you get a judgment, who has to pay, whether the defense side can collect attorney fee liability from a losing plaintiff.

One of the problems that might arise under most loser-pays proposals as they exist in England or might be enacted in the United States is that they end up in practice somewhat one-way for prevailing plaintiffs—not entirely—because losing defendants do have the money to pay, they aren't worth suing in the first place unless they have the money to pay, and a judgment for damages plus the attorney fee, the defendant does have to pay it. Whereas often on the plaintiff side—not always but often—it is difficult to collect from a plaintiff without substantial assets. So the insurance company would have to consider the net of those effects and would probably wait for some experience to see what its costs would be.

If you are looking for a sure answer in advance of what the effects would be, I wouldn't trust anyone who says they could give it to you.

Mr. GEKAS. I have no further questions at this time.

Mr. MOORHEAD. Mr. Berman.

Mr. BERMAN. Thank you, Mr. Chairman. It is a very interesting discussion. I have a few questions I would like to ask.

First of all, is it fair to say that the diversity jurisdiction is essentially about tort cases and contract disputes and that that is the vast majority of the kinds of cases you would have where either the plaintiff would sue or the defendant would remove under section 1332?

Mr. ROWE. I think that accounts for the large majority.

Mr. BERMAN. In a contract case, could not the contract between the parties provide this kind of a losers-pay provision in any event?

Mr. ROWE. It could, it often does. Under California law, even if it is a one-way provision in a contract, it is turned by operation of California statute into a loser-pays provision if attorney fee provision is in there at all. Yes, parties can elect in advance in their contracts to make them loser-pays and often do.

Mr. BERMAN. So as to the question of commercial disputes and frivolous suits for breach of contract, the power is within the parties to remedy that problem through the contract?

Mr. OLSON. They may not be able to duplicate the way a system run by the courts would work but, yes, they can certainly duplicate a first-order effect.

Mr. BERMAN. It is an interesting pilot project but not so much in loser-pays. With the exception of the very heeled plaintiff in the tort case who has a very, very high likelihood of prevailing, what this really is a test case of is diversity jurisdiction for defendants only, and unless we can assume that it will soon follow that States will quickly adopt this rule, I don't understand exactly what we think we are going to show from this, other than a high propensity to keep those tort cases in State courts.

Mr. ROWE. I am not sure it would be limited to defendants only.

Mr. BERMAN. The removal.

Mr. ROWE. Of course they wouldn't get to take advantage of loser-pays by removing the way the bill is drafted.

Mr. BERMAN. I understand. They are going to lose and may want to lose—well, they are not going to—they may have their own reasons for wanting to go to Federal court. It will not recapture loser-

pays to remove to Federal court. I am not sure what you are getting at other than changing the whole nature of the diversity jurisdiction.

Why wouldn't it make more sense to repeal the diversity jurisdiction than to take this approach?

Mr. ROWE. There is a further effect because the entitlement to loser-pays fees, as I read the bill and some of the cases dealing with how statutes dovetail with rule 68, rule 68 would not affect the loser-pays fee entitlement under this bill and that means that the fee entitlement stays tied to the liability outcome and is not affected by whether the plaintiff wins big or wins small on damages.

So some plaintiffs with very strong cases on liability, even if they were not very well-heeled, if you have a sure thing but a very doubtful case on whether it involves large damages could be tempted to file in Federal court, they have nothing to lose. And what kind of case fits the characteristics I have just described? Sure thing on liability but very iffy on large damages, whiplash.

Mr. BERMAN. Or McDonald's coffee.

Mr. ROWE. Cases that are a sure thing on liability but not on damage. The whiplash plaintiff hit in a rear-ender which is clearly defendant's fault would have every reason to file in Federal court.

Mr. BERMAN. In the legal aid situation you have described in Great Britain where a higher percentage of the average—a higher percentage of cases are covered by legal aid. Are the clients there subject to loser-pays?

Mr. OLSON. Basically, no.

Mr. BERMAN. So that essentially by custom or by law, there is an exemption for people who cannot afford to hire their own attorney?

Mr. KRITZER. That is basically correct.

Mr. BERMAN. This bill has no such exemption?

Mr. KRITZER. That is correct.

Mr. BERMAN. And separate from that, legal aid societies here are prevented from handling cases on a contingency basis?

Mr. KRITZER. Legal services corporations are not essentially permitted to handle cases that would otherwise be permitted to be handled by priority lawyers on contingency basis.

Mr. BERMAN. So if we were going to make this change and recognize the unfairness of how it works for a defendant who essentially has no marginal income or savings on what he or she makes, you would want to exempt—if you equate or make it similar to the English rule, you would exempt in effect low-income or moderate-income plaintiffs from this rule?

Mr. OLSON. That would not actually be what one would do in order to get an equivalent for a couple of reasons. According to Professor Kritzer's paper I believe the British legal aid system represented 28 percent of personal injury plaintiffs in a recent survey. One feature of their legal aid scheme is that it screens out what it finds to be weak claims by its clients. American defendants only wish there were some equivalent screening in the cases filed against them. A more important reason is the British offer into court rule, which influences the reason not to include incentives of even the most impecunious plaintiff. This rule is tremendously powerful in Britain and some version of it here.

The British defendant, as I understand it, can make such an offer to a legal-aid-assisted plaintiff saying: a reasonable offer is 5,000 pounds on this. If you continue to litigate against me and get 3,000 pounds, there will be a deduction from that award of 3,000 pounds based on the legal costs you inflicted on me. As I understand it, legal aid has to pay attention to those offers. It can't just ignore them.

Mr. BERMAN. I do find it interesting in this bill that there is a loser-pays provision in the securities section but it is not capped at the fees charged to the nonprevailing party so, ironically, we have twisted around against what I assume might be the most well-heeled defendants, there is no protection for the plaintiff that they will not be hit with a fee bigger than the amount that they might have reasonably been charged by their lawyer if it was not on a contingency basis, whereas in these other cases you do have that protection for the defendant.

One other thing and I will finish and then ask for your comment. This whole question of shouldn't there be, and I guess you have spoken to it—wouldn't you agree that we should have some standards to give the judge for reducing the amount of fees to be awarded to the prevailing party based on personal ability to pay, on closeness of the case, laying out some of the factors in the statute rather than just sort of delegating to the judge this very loose, vague, discretionary ability which could end up with massively different results in different courts?

Mr. KRITZER. I think you would probably reduce the disparity in results across courts but I doubt if you would reduce the amount of satellite litigation over those questions. The interpretation of those points in specific cases would become subject to substantial litigation.

Mr. ROWE. There are some guidelines in rules like that in Alaska that recently got revised, so there are places to look for guidance to Federal judges about what is done in some other systems. Back to your point about the securities title, very often securities litigation is class litigation in which the plaintiff can expect only a smallish share of the recovery yet probably the loser-pays liability would be 100 percent on the named representatives. It is very hard to collect from unnamed members of a class, so the leverage would be even compounded above what you described.

Mr. KRITZER. Canada made efforts, Ontario in particular, to deal with the class action problem because it poses all sorts of dilemmas in that setting because, do you impose those fees on the single lead plaintiff or do you spread it in some way.

Mr. OLSON. Not to read the minds of those who drafted the securities portion, my guess is that they view that area of law as a commercialized area of litigation where the lawyers are in charge as the real parties interest. There would not be the same kinds of hardships involved as there might be in a area where most of the complainants are genuine individuals who sought to sue.

You raise a point as far as precedent for how the courts would administer this. I agree about the desirability of some details on what constitutes exemptions and what doesn't. We have a rather rich body of existing precedent, rich if problematic, in the hundreds

of one-way fee-shifting statutes that have been enacted over many years.

As I understand it, these one-way fee-shifting statutes—which of course impose on defendants with strong cases the risk of losing on a fluke and pay two fees—very seldom contain any provision saying that the fee shift will be suspended for a close case or a reasonable 40 percent chance of having prevailed. Maybe that needs to change as we change the other things.

Mr. MOORHEAD. Mr. Coble.

Mr. COBLE. Thank you, Mr. Chairman.

Gentlemen, good to have you all with us, particularly Professor Rowe who is just down the road from my district in Carolina. Let me talk about the Contract With America, which has brought us here today.

Much has been said about that Contract. Many people have forgotten that the Contract didn't guarantee enactment of any of the provisions. The Contract is a promise that things will be brought to the House floor for an open and disclosed vote. The reason that is so noteworthy is that in the past we had difficulty getting these controversial provisions to the floor. I probably will support most of the Contract, but I have some problems with the loser-pay feature, and let me share those with you if you will.

The word "disincentive" plagues me. Professor Rowe, you touched on it with your strict liability illustration. Professor Kritzer touched on it very illuminatingly in your hypothetical with the fictitious plaintiff, Mr. Smith. That is going to result in disincentive to initiate lawsuits. I will be first to admit that abuse occurs when frivolous lawsuits are initiated and litigation ensues.

Innocent defendants suffer in these situations. And to impose a loser-pays penalty exclusively upon those who are guilty of this abuse would be a fine result. The problem is, we don't have that exclusivity present here. And I just fear that the loser-pay is going to be a disincentive to those who file and who initiate their lawsuits and who become involved in the ensuing litigation who do so in good faith. That is my opening sermon. Let me put a question to you gentlemen if I may.

In this town, when I see legislation being discussed, I look not so much at what is before me but what may be before me next session or the next session. Having said that, loser-pay now provides that the loser makes restitution for the attorney's fees incurred by the prevailing party or the winner in that case.

What bothers me is somewhere down the road we may enlarge that to include additional costs. This confines it to fees. I am concerned about the door being ajar, with the nose of the camel being under the tent. Talk to me and assuage my pain about this.

Mr. ROWE. These are not the nose; fees are the big item, they are the big ticket. I can't think of anything else out there, especially in light of the figures you were hearing about lawyers' costs from the first panel, that poses a camel's nose under the tent danger. This is both humps. The lawyers' fees are much the largest part.

Mr. Olson was mentioning that another possible item is expert witness fees, which can be significant but tend not to be anywhere nearly as large as lawyers' fees in most cases. Congress has actu-

ally approved the award of expert witness fees in some cases under existing Federal fee shifting laws.

Mr. COBLE. I recognize that fees constitute most of the meal but I can see added condiment involving cost that could be at least uncomfortable to a person of modest means.

Mr. OLSON. Once one starts trying to make people whole in this way; it's true that one starts noticing that one hasn't actually made them fully whole. They are still out many tens of thousands of dollars in other expenses, not to mention the interference with their business and personal life, the pain and suffering, if you will, of the reputational damage.

Each of the foreign systems is different. Some do reimburse expert witness fees, I believe, on a two-way basis, not just one way. But it may be reassuring to note that none of the foreign systems came to an equilibrium at reimbursing more than 100 percent of even the economic costs. Sweden and Norway reimburse you for the time and energy of showing up at court appearances which you are a prevailing litigant, but by and large these countries do not fully reimburse out-of-pocket costs. They give lawyers' fees but not other things or they give half your lawyers' fees plus other costs. They have stopped there for a good reason, which is if you allow gold-plating of the reimbursement requests, you get a lot of other abuses.

Mr. KRITZER. In England, in fact, typically the costs cover the whole gamut of costs involved in a case. But there are fairly strict guidelines on what costs are allowable in terms of the amounts that can be allowed for certain kinds of activities, both of lawyers and of experts.

Mr. COBLE. I don't want to portray the role of prophet of doom and gloom but this is the purpose of the hearing is to touch every base.

One final question involving the contingency fee situation. I was going to ask the gentlemen from California and Minnesota who were here earlier about this. I presume that the purpose for this is to sanitize the testimony and be sure that we only receive objective and unbiased testimony which is noteworthy and desirable, but I think we assume that risk, gentlemen, with witnesses who would regularly be paid by either party.

If you have a witness who takes the stand and he or she is going to be paid by either party, we assume the risk there of having testimony that is not completely objective, do we not? Am I missing something here on this phase?

Mr. KRITZER. I am not aware of large numbers of cases where witnesses are in fact paid on a contingency basis. I may just not have heard of them. But I think you are correct that experts tend to exist on one side of a case or the other and, in some cases, to be repeat players and they know or can know that appearing in the future depends upon what they say this time around. I think that is probably more of an issue than contingent fees being paid to expert witnesses.

Mr. OLSON. The problems with expert testimony go far beyond that of witnesses who are collecting contingent compensation. That is I think why the bill includes other and usually considered more important parts of the expert witness process.

One point on British fees. The British taxing masters, as they are called, are generally considered skinflints who will not reimburse your lawyer as much as you actually would have paid. They have found over time that is the way to do it.

Mr. ROWE. One of the things that has gotten more consideration in response to the problem you are talking about is greater use of court-appointed experts, and the Federal Judicial Center has been looking at various ways of enhancing this. There are other efforts out there to make sure the witnesses are not only qualified, but trying to get some that are more likely to be impartial.

Mr. COBLE. Certainly I would promote and endorse that as well. Is it a problem, and I am not talking about boilerplate expert witnesses now, but is it a problem that witnesses appear and receive no compensation and then, dependent upon the result, receive contingency fees for their serving?

Mr. ROWE. I am not aware of that being a widespread problem. For one thing, as counsel for a side presenting a witness, I wouldn't have such an arrangement because ordinarily the fee arrangement of the witness is subject to being brought out in testimony. To say that a witness is getting an hourly payment from one side is something that doesn't enormously undermine the credibility of a witness.

But if it comes out in testimony that a witness is getting paid only, if or a larger amount if, the side for which the witness is testifying prevails seems to me the kind of thing that would make any jury enormously skeptical.

Mr. COBLE. This is a fragile course.

Thank you, gentlemen. Good to have you with us.

Mr. OLSON. If I could add one point. If you call the American Medical Association, they will provide you with interesting material on the problem of contingently paid medical witnesses and the controversy over whether that should be barred by ethical rules of the medical profession.

Mr. MOORHEAD. Mr. Bono.

Mr. BONO. Thank you very much. I am certainly not a lawyer, so I will ask a few questions, but they are going to be far more basic.

Mr. COBLE. Don't say that so proudly, Mr. Bono.

Mr. BONO. First of all, I just want to establish something, and I assume the point of what we are doing today is to try to seek more equity in the legal system in the area that we are talking about.

Would that be a correct assumption?

Mr. ROWE. Equity and also appropriate incentives for people's litigation conduct and the cost of litigation, equity and incentives, I would say. How it affects people's behavior in suing, settling.

Mr. BONO. Why people are suing. The second question I would ask Mr. Kritzer and Mr. Rowe is, would you agree that the current system isn't working or providing equity?

Mr. KRITZER. I wouldn't agree with that. I don't think we really know for sure. For example, we know little or nothing about the frequency of frivolous cases. We have talked typically about how much more litigation there is in the United States. The assumption is we are the ones that are wrong. Perhaps there are situations in

which there are cases where there should be litigation, but they do not occur in other countries. So I am not fully convinced that it is out of control.

A lot of the statistical indicators show declining numbers of cases in a variety of arenas, declining verdicts, et cetera.

Mr. BONO. So you are not particularly seeking reform from the system that we have currently?

Mr. ROWE. I would say that we have problems but there are also other efforts to try to address them such as rule 11 in the Federal courts, various reforms of discovery undertaken—not always popular with this body—but continuing efforts to say what is going wrong and how do we fix it. Is everything perfect? No, but there are lots of efforts out there to get it right.

Mr. BONO. Just a broad term again. Would the contention on this bill be that we are just reversing the equity now going from one side, say the rich to the other side, to the poor? Is that the theme of the problem with this bill or is it the intricate portion of the bill that has different details that don't seem to work?

Mr. OLSON. It sets a different balance on both sides. It encourages some plaintiffs' cases and some defendants' cases. To my mind, we have gotten badly out of balance in the power we have given the litigant with a very longshot on either side. I think it would help to rectify that imbalance.

Mr. KRITZER. One thing we don't know a lot about is the amount of selectivity and screening that goes on on the part of lawyers. There is an assumption that lawyers will bring any case that is brought to them or they will go out and find the cases if they are not brought in. There is a little bit of evidence that suggests that in a variety of arenas lawyers turn down vastly more cases than they ever accept.

Mr. ROWE. And there is a strong incentive to do so from the contingent fee, because 33 percent of a loser is zero.

Mr. BONO. Are you questioning the assumption that some lawyers would sue haphazardly for a matter of economics?

Mr. ROWE. I do in some cases.

Mr. OLSON. I take the opposite side. I believe the economic calculation for a contingency-fee lawyer is often to file dubious cases because of settlement offers.

Mr. BONO. Let me tell you what I do know about. I was a mayor for 4 years in a city and every other week we would have a closed session to handle litigation. And it was an interesting process. I kind of felt like the soldiers in Gallipoli when they had to get out of the trenches and knew they were going to be shot down. And what we did is we went over all the lawsuits that occurred in that period.

And I would say—oh, gosh, I will be conservative—90 percent of the time we could win the lawsuits. But because of the costs and because of what we would have to go through to win the lawsuits, and why it would cost the taxpayers exceedingly more, we would settle.

And I can guarantee you, you don't have some facts in that area. In fact, usually just in our district there were lawyers there just lining up and gunning us down and that was their game and they

knew it very well and we knew it very well. And it did, in fact, exist just so clear your mind.

Mr. KRITZER. I have no doubt that such cases do, in fact, exist. But the percentage of cases on the court dockets that fall into those categories, there is little or no evidence as to what percentage those are. It could be that the city was seen as an easy target, that the city would stand up and fall over.

Mr. BONO. I would submit that cities, if you went into cities, and my city is just one in our district. There are several, and I would submit that all the cities went through the same pain that I went through as the mayor. And that that game—and I call it a game—did, in fact, exist and does exist and it makes you want to cry because there is nothing you can do about it except get out of the trench and get shot.

So I just want to say that I think you are mistaken. In fact, I am sure you are mistaken if you are going to accept the notion that we have equity now in the legal system in the way it is structured.

And I am sure that if all those cases I had to deal with every other week, if the liability was on the suer, we would probably have had about 90 percent less of those lawsuits.

So, I think the goal here is bipartisan. I think the goal here is to try to get a better method. And I think the goal here is to try to save the taxpayers' money. And I submit to you—and again, I don't have the depth of knowledge that you do in law—that games and frivolous lawsuits exist extensively. And if it isn't stopped soon, anyone can become a target.

And I will take it one more step. When you become a known personality, one of the other things you have to be fearful of is you become a target constantly. And so most of my life, I had to give great attention to what I did so that someone could not sue me. So I had to carry a lawyer in my pocket at all times.

And again, I say that is a failure in the system and that to not put a reality on that is a mistake. And so, the particulars are right here; maybe they are not. But I say, generally, we have to make these changes and we have to make them soon because this country is being abused. And for—the reason I am here and have this job is to stop being abused and having the public and the taxpayers and myself be abused, thank you.

Mr. MOORHEAD. Mr. Hoke.

Mr. HOKE. Thank you, Mr. Chairman. I am not sure who I want to direct this to. I apologize that I was not able to be back for the beginning of your opening statements, but this is—who among you, if any, has the information as to what percentage of the manufactured costs that are devoted to product liability or allocated to product liability for a specific industry that you can compare United States product liability costs to German, to Japanese, to English, or Western Europe or if you could give me some idea.

Mr. OLSON. I can undertake to get some figures relatively rapidly if there is a chance of entering them in the record or providing them to your office.

Mr. HOKE. Do you have any feeling?

Mr. OLSON. Vastly greater as a multiple, here.

Mr. HOKE. Two, three, four times?

Mr. OLSON. More. Patrick Atiyah, the Oxford legal scholar, did a fascinating article in the *Duke Law Journal* in 1987 which compared the British and American systems for volume of litigation in various categories and with three times the number of lawyers per capita, the United States managed to achieve 10 times the monetary volume of tort litigation, and 100 times the volume of product litigation.

Mr. HOKE. I understand that, but the specific thing I am interested in, if you take a particular widget that is manufactured in the United States that costs \$100 and it costs the same in Europe, what is the percentage—how many dollars are spent on product liability insurance or its own sinking fund or contingency fund in the United States versus the European manufactured good? Does that information exist?

Mr. OLSON. I think trade associations could probably get it in short order.

Mr. HOKE. I would very much like to have that.

Mr. ROWE. Once you have that information, of course, the extent of any American differences that were due to the attorney fee rule would be a separate question. There is also substantive law and all that.

Mr. HOKE. I understand that. But it is information that is going to help inform an analysis of that.

Here is my question. I happened to have occasion a decade ago to practice law for a client with a particular problem in Switzerland and I discovered much to my surprise that not only were our contingency-fee arrangements considered unethical there, but they are also illegal. And I wonder is that true on all of the continent? My understanding is that it is true in most places. Who knows the information?

Mr. KRITZER. I actually have that information.

Mr. OLSON. Greece allows them and has very high litigation rates. What does Spain do?

Mr. ROWE. Professor Kritzer has done some important research that shows that even when contingent fees are formally outlawed, what happens as a practical matter is that you get things working as a contingent fee because the plaintiff's lawyer, when they don't win, will not try to collect in many cases from the plaintiff. That means that they don't have a contingent-fee agreement up front, but if I understand correctly—

Mr. KRITZER. Let me give—all provinces of Canada except Ontario; Scotland; Northern Ireland.

Mr. HOKE. These are places where it is legal or illegal?

Mr. KRITZER. Permit a contingent fee. Not the American contingent fee, but they permit a no-win, no-pay fee. Japan permits a no-win, no-pay fee.

Mr. HOKE. What kind of a cap on the percentage?

Mr. KRITZER. This is the tricky question. We talk about a contingent fee. What we have in the United States would be probably better described as a commission fee. There are fairly few countries that permit—

Mr. HOKE. Are there any?

Mr. KRITZER. Greece.

Mr. OLSON. But a distinction here is enormously important in practice. Take the double-fee-or-none Scottish system, for example, which tries to give the poor person with a good claim an option he does not have in the English system. The Scottish lawyer may not be paid if he loses, but he does not get a percentage of the damages if he wins. That makes the dynamic of the argument over damages very different from ours. The lawyers in Scotland has no personal stake in exaggeration.

Mr. HOKE. There is only one other country that has a commission-fee system, as you put it, and that is Greece; is that correct?

Mr. KRITZER. In regards to personal injury, I believe at this time only Greece. There are some other countries that permit commission fees in other kinds of cases.

Mr. HOKE. How can we sort out which is the problem? Is the problem that we don't have a loser-pay or is the problem more focused on the issue of the contingent fee? Because also in my experience with this Swiss case, they do have a loser-pays rule as well. And in fact, there you have to post a bond in Switzerland as the plaintiff, which is quite a shock for an attorney from practicing civil litigation in America, but you have to post a bond based on the amount of damages sought. So clearly that has a chilling effect on litigation or at least it certainly is going to make you think twice before you bring a suit that may not be one that you may believe in.

Here is what I am trying to sort out, is that I am assuming that this number that you are going to get for me is that we are—we have created a significant competitive disadvantage for ourselves without knowing exactly what the benefits are in terms of opening up our judicial system. Have we opened it up to people that have genuine justiciable kinds of actions that should be compensated or have we opened it up to a tremendous expense and burden that really is unjustifiable? I tend to come down on the latter.

But how does it get fixed? Does it get fixed through modifying the contingent fee in a way that is clearly sensitive to those people who cannot afford access or does it get fixed with this loser-pays idea?

Mr. ROWE. Remember that product liability claims against foreign manufacturers in the United States would be under U.S. law. And for many product liability claims against U.S. manufacturers in foreign countries, unless brought in this country, there is a good chance that they would be brought under foreign law. So the disadvantage may still be there, but it is balanced out somewhat by the—

Mr. HOKE. I am assuming that we are manufacturing most our goods for America and the opposite is true for Europe. I would like a specific answer to my question.

Mr. KRITZER. If the question is, which is more important, the contingent fee as an incentive, or the loser-pays rule as a disincentive—and I don't necessarily accept your characterization of the problem, but as a disincentive—I would argue that probably the losers-pay rule is a greater disincentive than is the contingent fee, than is the no-win, no-pay fee as an incentive. There is more impact coming from the loser-pay, or the absence of it in the United

States, than is coming from the presence of a contingent fee in the United States.

Mr. OLSON. I find and have argued at length in my book that the contingency fee is tremendously important in explaining differences between the countries. It is a separate area to be reformed. There are certain reforms in the current package which also address it. But loser-pays can be achieved separately. I think Alaska would be an example of a State that has contingency fees and loser-pays.

Mr. HOKE. My concern about loser-pays is that it really is only loser-pays in certain situations where the loser can afford to pay and that where the loser cannot afford it you are not going to have it.

Mr. Kritzer, you seem to suggest in your testimony that the loser-pay rule frightens people with good and bad cases both. And I wanted to read some quotations from you about how people with both good and bad cases felt the loser-pay rules worked in Ontario.

Quote, "It is often a major consideration in prompting courthouse steps settlements." Quote, "Fee shifting forces people to be more realistic about what they want to accomplish." Quote, "The cost system discourages frivolous litigation." And, quote, "If the case is weaker than it might be, I might be more likely to settle that case because opposing parties costs are often—are another important factor in the calculation."

These quotes are probably familiar to you because they come from your own interviews in the publication, the *Journal of Law and Contemporary Problems*. What is striking to me about these is that there clearly is a thread of linkage between the quality of a party's case and the impact of concern about losing. And it does not seem to me that the results of the loser-pay rules are frightening at all but, as indicated by you, can be a very effective tool for plaintiffs who have strong cases and for defendants also who have strong cases. If it works in Ontario, why wouldn't it work here?

Mr. KRITZER. If I can tell another Ontario story as a response to that, when I was first beginning my work in Ontario, I was introduced to a law professor by the name of Garry Watson at Osgoode Hall and he told me about contracting to sell a house at a particular price. Between the time he contracted and the day that the closing came, the market had changed in Toronto and the seller came in and said, I am not going to pay you your price. I am going to pay you \$20,000, \$40,000 less. At that point his only choice was to either forget the sale and try to sell it again or accept what was offered and consult an attorney, so he did the latter.

The attorney informed him, well, here is what might happen, and talked in terms of the likelihood of winning. It sounds like a good case to me, but I never can be sure. Watson decided not to pursue it, even though on paper he had what appeared to be a very strong case and this is a sophisticated player.

No doubt, the loser-pays rule discourages weaker cases. I have no doubt in my mind that is the case. Particularly when the plaintiff has assets that can be seized if he or she loses. The dilemma is whether or not the number of weak cases that will be discouraged is more—is greater than or less than and how we are going to balance that against the stronger cases.

It is also clear that the loser-pays, particularly when you combine it, as they do in Ontario with a rule 68 type model, there are other aspects of the settlement process that have important effects in prompting settlements at different stages of the process. And, of course, we know that in the United States, the vast majority of the cases—vast, vast, vast majority of cases do settle under the current system.

Mr. HOKE. Didn't Mr. Watson have a third alternative? Couldn't he have sued for specific performance before accepting the counteroffer and then gotten immediate relief as a result of that?

Mr. KRITZER. He was in the bind of having already purchased another House—

Mr. HOKE. What I am saying, I think when you go for specific performance you can get a much quicker kind of result. Anyway, thank you.

Mr. COBLE. Will the gentleman from Ohio yield to me?

Mr. HOKE. I certainly would.

Mr. COBLE. Your request concerning comparative figures from European countries, would you amend that to include Asian countries as well?

Mr. HOKE. Yes, I hoped to include that.

Mr. COBLE. I thank the gentleman from Ohio.

Mr. HOKE. Thank you. Thank you, Mr. Chairman.

Mr. MOORHEAD. I have two or three more questions I wanted to ask. Mr. Olson, there are over 200 fee-shifting statutes that shift fees just one way. In your testimony you suggest that applying loser-pays to Federal question cases, particularly those statutes which require one-way fee-shifting, might be a good place to introduce loser-pays to the American judicial system.

Can you particularize for the committee the advantages of a loser-pay provision to convert what is now a one-way shifting into two-way shifting?

Mr. OLSON. There are several advantages, one obviously being that judges are already familiar with how to administer the fee-shifting process as it works for those various statutes and for the litigation of the very issues that come up in those cases. Another being that on grounds of fairness, it strikes many of us as particularly unfair to put the Federal thumb on the scales by way of one-way-only shifting. This would repair that.

Another advantage is that a shift from one-way to two-way cases would apply to Federal rather than only diversity cases. We have heard from several Members, and I endorse much of what they say, that strange types of forum-shopping can be expected to start with State law claims. Professor Rowe describes the federalism problems as nontrivial. We would not have those federalism problems if we started with Federal question cases.

Mr. MOORHEAD. I have one other question for you. It is often said that we don't need a loser-pays system because of rule 11 sanctions provide enough protection for bad lawsuits. And, in fact, Professor Rowe advocates that Congress should consider rule 11 sanctions in lieu of loser-pay. I would be interested in your comments on this approach.

Mr. OLSON. I am delighted to hear rule 11 proposed so many times—now that people have been scared by something larger—be-

cause as we remember, it was only in 1993 that they gutted rule 11; they took away what had been an extremely powerful protection against the worst 5 percent of cases.

That having been said, European countries have found that you need more than that, that it is very hard to prove states of mind, bad faith, comparable kinds of things, and that is why, as important as rule 11 is, no country seems to have stopped there and shifted fees only in such cases. It just doesn't seem to provide enough relief in and of itself.

Mr. MOORHEAD. Professor Rowe, I have another question for you. You mention on page 3 of your statement that Japan is the only other big country without a loser-pay rule, which I think surprised many of us. It did me.

I wonder whether you would comment on Japan's practice of putting a tax on the filing of lawsuits which is a proportional tax so that the more you ask for in damages, the more you pay. And you pay the tax up front before you get into court. Does this have something to do with why Japan avoids lawsuits, even though it doesn't follow the loser-pay rule?

Mr. ROWE. It sounds like what Congressman Hoke was mentioning in Switzerland, with the deposit system with a similar effect. I am sure it would cut down also. Japan further has done a great deal to restrict simply the numbers of lawyers that are available to litigate cases.

But one thing that I might add about the Japanese system is that their chief variation from following the American rule is in tort litigation, where they do have one-way pro-plaintiff on the theory that this is necessary to provide adequate compensation for a prevailing plaintiff.

As I said before, I think there is a good deal to be said for a well-calibrated one-way rule that cracks down on frivolous claims and makes offers available to defendants. So I hope you would think long before tinkering with Federal one-way fee statutes.

Mr. MOORHEAD. Before we go on, I am giving an opportunity for one or two questions, if you have them. I know it is getting late and people have been here for a long time waiting for the second panel. Do you have another question for the panel?

Mrs. SCHROEDER. Maybe we need to do the old adage—somebody had a bill on the floor providing that for every car we take from Japan, they have to take a lawyer. Maybe that is the answer.

The only thing that I would like to ask, seriously, Mr. Chairman, is it seems that each of the witnesses in varying degrees has questions about this bill. And if there are any amendments that you think of, I certainly would appreciate seeing what you might think about whether there are things that would make it a better bill or make some of the things clearer.

I also understand that you may not want the bill at all, but the issue is assuming it would pass, how could we alleviate some of these problems that we brought up? And the chairman and I were talking about that. So that could be helpful, as a kind of take-home exam. Is that OK, Mr. Chairman?

Mr. MOORHEAD. That is right. And I would appreciate it if you have suggestions that you would make them within the next couple

of days, if you could. Because this process could be moving along fairly rapidly.

Mr. BERMAN. I have noticed.

Mr. MOORHEAD. Mr. Coble.

Mr. COBLE. No questions, Mr. Chairman. Thank you.

Mr. MOORHEAD. Mr. Berman.

Mr. BERMAN. The other Howard would like to know if you have this bill in its present form and it is about to go to the President for signature, is that a preferable outcome to the notion of reinvigorating rule 11 and providing some mechanism on this issue of offers and refusal to take offers and if you don't get higher after the trial, penalties ensue? Which is a better approach towards dealing with the problem of frivolous litigation? This approach or that approach?

Mr. ROWE. You are probably likely to get a 2 to 1 vote out of this panel.

Mr. OLSON. It may be 3 to 0 actually. The truth is that although I wrote an entire book calling for loser-pays, I am a conservative kind of guy. I think that things ought to be edged into. We know how a strong rule 11 would work. It would not be that hard to throw together a strong offer of settlement rule to strengthen rule 68. I think we can do all three including full loser-pays.

We have two of them on the table with pretty good details as it is. I think we can improve the third enough to make it a worthy part of the trio.

Mr. BERMAN. In other words, you don't like it in the form that it is in now, but you think it could be improved.

Mr. OLSON. I think it needs tinkering and that the committee will hear from a lot of people about ways that it could be improved.

Mr. KRITZER. The rule 11 and the rule 68 changes actually speak to somewhat different issues, one being frivolous cases, the other being unreasonable demands and unwillingness to settle. And given a choice between those two versus a loser-pays rule, I would greatly prefer the two alternatives.

Mr. ROWE. As would I.

Mr. BERMAN. Thank you. And I am going to finish, Mr. Chairman, except to point out that I do find it interesting to note such a broad consensus that the marketplace has so failed in the area of attorney's fees here, and that the need for government regulation seems very attractive to so many people. Thank you.

Mr. MOORHEAD. Mr. Bono.

Mr. BONO. No, I have no more questions.

Mr. MOORHEAD. Mr. Hoke.

Mr. HOKE. If I could ask one and maybe you could even point me in the direction of other material to get some handle on this. Do you have any insight into how we have evolved historically in the United States in a direction where here it is a part of our national ethos that an attorney having a financial stake in the outcome of his client's case is not only taken for granted, but it is almost seen as a positive.

Whereas, if you go and speak to people in other parts of the world about this, that they have a very visceral, ethical reaction to that as being fundamentally wrong. And how did it happen that we

went in one direction and they went in another direction with a great deal of conviction in both areas?

Mr. ROWE. For one thing, this is part of a larger picture with the United States, I think, being much more market-oriented when it comes to the provision of legal services in several respects. Some of it is recent; some of it goes back much further. But the permission of attorney advertising, which also shocks people elsewhere; the very limited provision of legal aid for the indigent in the United States as opposed to broader schemes, in other words, we leave it to private charity with less governmental intervention; these are further examples of a whole general picture that we have tended in many respects to be more market-oriented than the other systems around the world. That is one aspect of explanation.

Mr. KRITZER. The legal profession, I think, in the United States reflects the entrepreneurial spirit in the country. They have sought ways of providing legal services to people who otherwise would not be able to purchase them. They saw a market and they made services available.

Mr. OLSON. My analysis is somewhat different. We have to remember that most market systems, even the 19th century ones that come closest to textbook *laissez-faire*, did not permit lawyers to charge a contingency fee. It was considered that the use of this type of government force, which is what lawyers wield when they have an opponent into court, should not be commercialized because you will get too many abuses.

The contingency fee has produced a wide separation between the ethos of the American legal profession and their compatriots abroad. Ours see themselves more as players. They have much more power in society. The defense lawyers and the transaction lawyers also think more in terms of being players and taking a stake in transactions and I am bothered by that also.

Mr. BONO. Will the gentleman yield? On one question?

Mr. HOKE. Sure.

Mr. BONO. Mr. Olson, just based on stats, hard, cold stats, would you say that in your review of the systems and you have come to the loser-pay system, do the stats show strongly that that is an improved system over the system that was used in the past? This is just a hardcore statistical point of view.

Mr. OLSON. I think it does show that. Obviously, it depends on what you want to get out of the system. If you are looking for economy, for a public sense that the cases that are winning are good cases, if you look for a minimization of the terror level the people who have to run city governments, businesses, almost any institution, then I think the balance they strike works out better. If you look at the statistics, yes, they have much less litigation.

Mr. BONO. Thank you.

Mr. ROWE. Although if you plunk a rule down like this in the American system as it otherwise stands, it is likely to work very differently from the way it works in the quite different legal cultures of other countries.

In Alaska, they have had a great deal of grumbling. They have kept the rule, but they have cut back on the amounts that are awarded under it, and they have a great deal of costly side litigation. I am not aware that Alaska has much less of a litigation ex-

plosion problem than comparable States that don't have the loser-pays rule.

Mr. BONO. Just one more comment. The reason I ask that is, in my opinion, that at some point everything has to be broken down to general statistics on a broad scope. And then there is a line, and then there is another line. And one will tell one story and one will tell another. If it is based on factually, I think that gets you closest to the decision that you have to make and gives you an accurate picture. And in my view, it is the only way that you will ever be able to take an accurate picture. Thank you.

Mr. MOORHEAD. Well, I want to thank each one of you. This has been an interesting discussion. I think we have had a pretty well-balanced panel here. So if you do have suggestions for us or amendments or anything, regardless of whether you are for or against the bill, I would appreciate you giving them to us.

Mr. OLSON. Thank you, Mr. Chairman.

Mr. MOORHEAD. Our next panel will discuss lawyer accountability and the use of sanctions against lawyers under rule 11 of the Federal Rules of Civil Procedure.

Mr. John Frank, who is a partner in the law firm of Lewis and Roca is appearing today on behalf of the American Trial Lawyers Association. Mr. Frank has been a member of the Rules Practice and Procedure Committee of the Judicial Conference of the United States and has taught at Indiana Law School and Yale Law School. He served as law clerk to Justice Black and has published extensively on matters of legal history and constitutional law. He is no stranger to this subcommittee. Welcome, Mr. Frank.

Also on the panel is Ms. Debra Ballen, senior vice president of the American Insurance Association. In this position, she is responsible for anticipating and developing issues and for assisting in the formulation of the association's legislative policy positions.

Ms. Ballen is a native of New London, CT. She graduated with a juris doctorate degree from Harvard Law School and an A.B. degree from Princeton University. Welcome, Ms. Ballen.

Our third witness on the panel is Mr. John Foster, who is presently chairman of Malcomb Pirnie, Inc., which is comprised of environmental engineers, scientists and planners and is headquartered in White Plains, NY.

Mr. Foster, as past president of the American Consulting Engineers Council, will be appearing this morning on their behalf. This organization represents the business interest of all disciplines of consulting engineering firms nationwide who annually design over \$100 billion of constructed public works and private industry projects. Welcome, Mr. Foster.

Ms. Ballen, you may be first to go followed by Mr. Frank and Mr. Foster.

STATEMENT OF DEBRA T. BALLEEN, SENIOR VICE PRESIDENT, POLICY AND DEVELOPMENT RESEARCH, AMERICAN INSURANCE ASSOCIATION

Ms. BALLEEN. Thank you very much. My name is Debra Ballen and I am senior vice president of the American Insurance Association. AIA supports measures to promote an equitable and efficient

legal system and we commend you for including H.R. 10 in the Contract With America.

As you know, my testimony concerns the bill's proposed amendments to rule 11 of the Federal Rules of Civil Procedure. While casual observers might view this as a largely technical matter, AIA believes that rule 11 has the potential to be one of the most effective means of curbing lawsuit abuse and I believe that this opinion was shared by the three panelists before me this morning.

And I would like to thank you, Chairman Moorhead, for recognizing the importance of rule 11 and for the leadership role that you played in trying to prevent adverse changes from taking effect during the 103d Congress. Section 104(b) of the bill now before this committee will help to accomplish that important objective.

Rule 11 was strengthened and revised in 1983 in response to concerns about frivolous claims and abuses. The 1983 changes were designed to encourage lawyers to stop and think before filing lawsuits and court papers and to establish a system of mandatory and meaningful sanctions for abusive litigation tactics.

In the words of Supreme Court Justice Antonin Scalia, the 1983 version of the rule was "a significant and necessary deterrent to frivolous litigation."

A 1991 report by the Federal Judicial Center found that an overwhelming majority of Federal judges thought that the 1983 rule had an overall positive effect and justified the expenditure of judicial time. Another study by the American Judicature Society found that the rule has modified lawyer's behaviors in a number of beneficial ways, most importantly by encouraging them to engage in more factual investigation.

Unfortunately, despite its benefits, rule 11 was weakened by the Judicial Conference in 1992. Notwithstanding the vigorous dissent by Justice Scalia, the Supreme Court engaged in only limited review of the proposed amendments and forwarded them to the 103d Congress.

Chairman Moorhead took the lead in trying to prevent the adverse changes, but due to congressional inaction the weaker rule was allowed to go into effect in December 1993.

Section 104(b) of H.R. 10 offers this Congress the opportunity to restore an important procedural safeguard and take action against those who exploit the legal system. The bill reestablishes a system of mandatory rather than discretionary sanctions. Mandatory sanctions are important.

As Justice Scalia wrote, "judges, like other human beings, do not like imposing punishment when their duty does not require it, especially on their own acquaintances and members of their own profession."

In addition, section 104 mandates the use of attorneys' fees as part of the sanction and it puts a bigger emphasis on correcting the harm done to the other party. Appropriate monetary sanctions, including the award of attorneys' fees, are important for deterrence. They also provide some restitution for parties that are harmed by sanctionable misconduct.

While we strongly support the bill as written, we also recommend inclusion of language to restore the requirement for lawyers to check their facts before filing lawsuits as well as language

to prevent circumvention of the rule by those who withdraw challenge pleadings during a safe harbor period. Together with section 104(b) as written, these changes would restore all the important aspects of the 1983 rule.

Weakening rule 11 in 1993 sent lawyers the message that lawsuit abuse would be tolerated by our judicial system. We commend the members of this committee for taking the opposite view, as was expressed earlier this morning. Preventing and sanctioning frivolous litigation is central to the notion of common sense legal reform and we are pleased to work with you on this important issue.

I would be happy to answer your questions and request that my entire statement be included in the record.

[The prepared statement of Ms. Ballen follows:]

PREPARED STATEMENT OF DEBRA T. BALLEEN, SENIOR VICE PRESIDENT, POLICY AND RESEARCH DEVELOPMENT, AMERICAN INSURANCE ASSOCIATION

Good morning. My name is Debra Ballen, and I am Senior Vice President, Policy Development and Research, for the American Insurance Association ("AIA"). AIA is a trade association representing more than 270 insurance companies which write a large portion of the nation's property/casualty coverage. AIA's member companies are substantially involved in civil litigation on many levels—when they defend the interests of their policyholders; when they pursue their policyholders' rights through subrogation; when they are involved in coverage disputes; and when they appear as a plaintiff or defendant in a wide range of commercial litigation.

I am pleased to have been invited to speak to you today regarding H.R. 10, the Common Sense Legal Reforms Act of 1995. AIA has a strong and continuing interest in measures to promote an equitable and efficient civil justice system, and we commend you for including legal reform in the 104th Congress's "Contract with America."

My testimony today will be limited to the provisions of H.R. 10 which propose to amend Rule 11 of the Federal Rules of Civil Procedure. While casual observers might view a federal rules change as largely technical, AIA believes that Rule 11 has the potential to be one of the most effective means of curbing frivolous and abusive litigation tactics by plaintiffs and defendants alike. Our Association previously commented before this Committee and the Advisory Committee on Civil Rules in support of a strong Rule 11. We opposed the weakening of the Rule that was allowed to go into effect on December 1, 1993, and we support your efforts to restore this important procedural safeguard.

BACKGROUND

Although federal courts have always had the authority to sanction frivolous pleadings and papers, the early judicial, statutory, and procedural guidelines were very vague, and sanctions were extremely rare. Speaking before the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, then Chief Justice Burger noted with alarm the "widespread feeling that the legal profession and judges are overly tolerant to lawyers who exploit the inherently contentious aspects of the adversary system to their own private advantage at public expense."

Concerns about "frivolous claims and defenses" as well as "dilatatory or abusive tactics" led in 1983 to a major revision of Rule 11 of the Federal Rules of Civil Procedure. Key features of the 1983 Rule included a requirement that pleadings/papers be reasonably based on facts and law, mandatory sanctions (against either the lawyer or litigant) for frivolous pleadings or papers, and the explicit recognition that a sanction may include an order to reimburse the opposing party for reasonable expenses incurred because of a frivolous pleading or paper.

In 1990, the Judicial Conference's Advisory Committee on Civil Rules undertook a review of the rule and asked the Federal Judicial Center to conduct an empirical study of its operation and impact. The study found that a strong majority of federal judges believed that: (1) the 1983 version of Rule 11 had a positive effect on litigation in the federal courts (80.9%), (2) the benefits of the rule outweighed any additional requirement of judicial time (71.9%), and (3) the rule should be retained in its then-current form (80.4%).

Despite this clear judicial support for a strong Rule 11, in 1991, the Civil Rules Advisory Committee included provisions to weaken the 1983 Rule in a broader package of proposed amendments to the Federal Rules. AIA and a number of other organizations filed comments against the Rule 11 changes, but in 1992, the Judicial Conference approved them as recommended. The proposed changes were then sent to the Supreme Court for approval or modification.

Exercising what it viewed to be a limited oversight role, the Supreme Court approved the proposed changes without substantive comment in April of 1993. In a strongly worded dissent on Rule 11, Justice Scalia correctly anticipated that the proposed revisions would eliminate a "significant and necessary deterrent" to frivolous litigation: "[T]he overwhelming approval of the Rule by the federal district judges who daily grapple with the problem of litigation is enough to persuade me that it should not be gutted." After the proposal was forwarded to Congress, there was a seven-month period under the Rules Enabling Act in which this body had the authority to make changes. Despite the introduction of H.R. 2927 by Chairman Moorhead and a companion bill in the Senate, no formal action was taken, and the revisions went into effect on December 1, 1993.

AIA believes that the new Rule 11 is much weaker than its predecessor. First, there is no longer a requirement for attorneys to inquire about the facts before filing a pleading or paper. Second, litigants and lawyers are permitted to withdraw challenged pleadings in order to avoid sanctions. Third, the mandatory sanctions that formed an important core of the 1983 rules changes have been replaced with a discretionary sanctioning system, and the prospects for compensating aggrieved opposing parties are greatly reduced. Taken as a whole, these revisions change the dynamics of a lawsuit such that frivolous and abusive conduct is much harder to address and eliminate. They also impair the prophylactic effects of a strong and unambiguous sanctioning procedure.

H.R. 10 AND RULE 11

H.R. 10 offers an important opportunity for the 104th Congress to take action in restoring a proven and important procedural safeguard that was weakened by the inaction of the 103rd Congress.

Section 104(b) of the bill makes several important changes to the version of Rule 11 that is now in effect. First, it reestablishes a system of mandatory, as opposed to discretionary, sanctions. Second, it mandates the use of attorney's fees as part of the sanction. Third, it puts a bigger emphasis on the Rule's compensatory function by clarifying that sanctions should be sufficient to deter repetition and to compensate the parties that were injured. All of these changes make good, common sense. Mandatory sanctions send a clear message that abusive litigation practices will not be tolerated by our judicial system or the judges who form its core. Appropriate monetary sanctions, including the award of attorney's fees, also help in deterrence and provide some recompense for parties that are harmed by sanctionable misconduct.

We support these beneficial changes and believe that they address several important aspects of the 1983 Rule. Without minimizing the importance of the bill as written, we also believe that Section 104(b) could be further strengthened to include restoration of two additional elements of the 1983 Rule which also were eliminated by the 1993 changes.

Most importantly, we recommend inclusion of language to restore the requirement for prefiling verification of the facts. Together with H.R. 10's Section 105, which requires the plaintiff to give notice to the defendant prior to suit, such a provision would help encourage resolution of claims prior to litigation, thus reducing unnecessary court costs and legal fees.

In addition, we recommend eliminating the "safe harbor" provision of the current (1993) Rule, which permits a lawyer or litigant to withdraw a challenged pleading, without penalty, prior to the actual award of sanctions. As Justice Scalia noted in his dissent to the Court's approval of the new Rule, "those who file frivolous suits and pleadings should have no 'safe harbor.' The Rules should be solicitous of the abused (the courts and the opposing party), and not of the abuser. Under the revised Rule, parties will be able to file thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose. . . ."

BENEFITS OF A STRONG RULE 11

Research examining almost a decade of experience under the 1983 Rule 11 confirms that the stronger version of the Rule beneficially affected the practice of law in the federal courts. Interestingly, while the Federal Judicial Center study of court activity found that Rule 11 issues were raised in only 2-3% of cases, a separate sur-

vey of federal court litigators by the American Judicature Society found that some 60% of practicing lawyers had changed their behavior to comply with the 1983 rule and/or avoid sanctions. For example, 24.5% advised a client not to pursue a lawsuit that the attorney thought had little or no merit, 28.8% tried to discourage a client from pursuing a particular action during litigation, and 36.7% did extra pre-filing review of pleadings, motions, or other documents subject to Rule 11. There were no extraordinary differences between the plaintiff and defense bars with respect to the level or type of behavioral changes. Moreover, each appears to be consistent with the goal of a strong Rule 11, which was to get litigants to "stop-and-think" before making court filings. They also make good, common sense.

In addition to its stated focus on pleadings and papers, the presence of a strong Rule 11 may have a broader purpose in controlling abuses throughout the litigation process. The wide range of behavioral changes attributed by lawyers to Rule 11 prompted the American Judicature Society to conclude that it "may well be that Rule 11 has become the 'generic' or 'all purpose' sanction, the one that is thought of and referred to for all kinds of sanctionable activity." Weakening the rule in 1993 may have sent lawyers and litigants the message that lawsuit abuse would again be tolerated. We commend the Members of this Committee for taking the opposite view.

CONCLUSION

Thank you for the opportunity to testify today on the provisions of H.R. 10 which would help restore the now-weakened Rule 11 of the Federal Rules of Civil Procedure. Preventing and sanctioning frivolous litigation is central to the notion of common sense legal reform. AIA commends your efforts to date and would be pleased to work with you on the supplemental concepts outlined in my statement today.

I would be happy to answer any questions you might have.

Mr. MOORHEAD. Mr. Frank.

STATEMENT OF JOHN P. FRANK, SENIOR PARTNER, LEWIS AND ROCA, PHOENIX, AZ

Mr. FRANK. Mr. Chairman, it is nice to be back. I suppose I have appeared before this committee in the last 40 years on pretty much all technical matters of procedure and jurisdiction and served extensively in this field. I am appearing at the moment at the invitation of ATLA, but I am making a request that is considerably broader than that and I hope you can give it thought.

The reason you are not hearing from the ABA is that under its rules, the house of delegates has to pass on any matter before they can speak to you, and the house of delegates doesn't meet until next Monday. They have before them a strong recommendation from the litigation section opposing both of these proposals. With reasonable likelihood, it will be adopted.

The American College of Trial Lawyers similarly cannot have its executive committee meet until the middle of this week. I rather anticipate that they will have views not greatly dissimilar to my own.

Mr. Chairman, it would be ashame—because of the pace, I know you are doing your level best to move this stuff along—but it would be ashame to keep the bar of the country from being heard effectively, and I hope that you can keep the record open for a couple of weeks so that the American Bar Association and the American College of Trial Lawyers can be heard through their official and appropriate bodies.

They are moving heaven and earth to get to you quickly and they will communicate and I hope that the horses are not all out of the barn before they can be heard.

Now, on rule 11, I did have a material hand in the 1993 amendment. I did coordinate the ATLA, the American Bar, the American

College, countless State bars, the academic profession and so on and I appeared before you then. I do not recall, Mr. Chairman, that you opposed that proposal at that time. My friend—some representative of insurance was the only person here opposing that recommendation of the Judicial Conference of the United States. And I do not—

Mr. MOORHEAD. I was opposed to it.

Mr. FRANK. I didn't recall clearly at that time. In any case, insofar as we are talking about the load of litigation, the earlier rule had led to over 3,000 matters of satellite litigation in the Federal courts and it imposed a terrible burden.

I am deliberately abridging. I have given you a full scale statement and I hope it can be included in the record and if any of you have keen interest, perhaps you will take a look. But in the interest of your time restraints, let me simply abridge and extemporize.

Not only was there an overwhelming burden of satellite litigation, but a great deal of viciousness came into it. There came to be a tremendous want of civility at the bar. This is a topic Chief Justice Burger spoke about, as I recall it, and others because it created a situation in which first the lawyer had to try his case and then he had to try the other lawyer and would be delinquent in his duties if he didn't. And that led to a terrible lot of, frankly, aimless satellite litigation.

The rule, as it was modified, has largely reduced this surplus, but it has by no means made the rule a toothless tiger. On the contrary, the safe harbor provision is working to introduce a degree of civility in the law.

Contrary to Ms. Ballen, I didn't find any reduction in the rule whatsoever of the duties of counsel to check carefully. Indeed, it was broadened to cover briefs and arguments as well as initial pleadings. So the new rule just adopted is a much broader rule than the earlier one in the way the safe harbor provision works.

Let me give an illustration. Two weeks ago, I filed a complaint. I included a particular party. Time was short. It had to be there. I get back a letter from the opposing counsel saying I think you are wrong about adding that party. I have to give you rule 11 notice to tell you that I invoke the safe harbor provision and if you do not reconsider this, you will be subject to sanctions under rule 11.

The other fellow is a sensible fellow and maybe I am wrong, so I write back and say let's put this case on ice for 10 days. I am going to have to go to Washington. I will look into it carefully and it may be that I will wish to retreat from my position, and maybe I will not and I will stand and if so, we go for his rule 11 sanction. But what I am saying is that the system has worked very well to create a considerably more civilized method of practicing law than we were having in the rather ugly 10 years that existed between 1983 and 1993.

There is another major factor. You just adopted this rule. It has gone through the normal process of the Rules Enabling Act. It is the law now by virtue of a year. I respectfully submit that this kind of catapulting turnaround would be highly undesirable. Judge Higginbotham of Texas, who was Chairman of the Rules Committee, has asked the Judicial Center for a survey of how the new rule is working and that research is underway.

It is highly undesirable to have flapjack rules that are this today and that tomorrow and so on. I respectfully submit that giving this rule, as long as it has been adopted, a reasonable opportunity to work itself out, to let the Judicial Conference take another look at it, to have it studied by the Rules Enabling Act and the Judicial Center, is a commonsense system.

There is—and even my skilled and respected friend on my left has not given you one single instance of any abuses which have occurred during the period that this rule has been in effect. And I respectfully submit that having been adopted, approval by a majority of the Supreme Court, both Houses having full chance to reject it and concluding not to, and it having become the law, that we should give it a fair chance to run before we throw in the ash can.

I would like to say just a word on the other topic also, if I may. And on the matter of loser-pays, let me respectfully submit that this is an ill-thought-through idea which has simply not been sufficiently developed. We talked loosely about adopting the English rule as though we were adopting the English rule, but there is not anything to that. The fact is—let me take the common-enough phenomenon. How do you decide who wins?

Take the case in which the plaintiff sues for a million dollars. The defense offers \$50,000 for a settlement because he doesn't think it is worth much. The jury brings in \$100,000. Who won that case? It is not self-apparent by a longshot.

The English system is very different from ours. They don't have the contingent-fee system. Fees are fixed in advance on both sides. They don't have the hourly rate system. If it turns out that the fee is proving inadequate, they have that delightful phenomenon, the refresher.

In short, we are dealing with a highly stabilized system. And on top of that, all of these fee questions are then left to a special master to decide and he can take account of the details of the particular case.

But if what we are doing here is spreading this all over the United States with no standards at all, the most trenchant part of Mr. Olson's remarks is that and I completely agree with him—in that portion of the present loser-pays, you are legislating a mood, but not a procedure and there just is nothing there without some way of knowing about settlement offers and who really is winning. The system is an invitation to chaos.

But I would like to make one other point. On this point I know that your chairman and I have had our differences for decades, I guess. I have, over the years, represented the bar of America. At times I have appeared here quite literally in behalf of all 50 States to protect the diversity jurisdiction.

The bar overwhelmingly wishes to see the diversity jurisdiction maintained. The last time this came up before this full committee about 6 years ago and a proposal to abolish diversity you voted it down by a vote of 26 to 6. And the whole bar of the country, every last bit of it was here in resistance.

What we have had since is a series of attempts to chip and chop to get rid of diversity; to change the amount and do something about the in-state plaintiff. That was the last time I was before

your chairman. And now we get the one of making diversity inhospitable by adding this loser-pays element.

I respectfully submit that there are roughly a total of 50,000 diversity cases in the Federal court out of the vast horde. If you mean to abolish diversity, it ought to be fairly confronted. Its values ought to be considered. Not a word has been said about what this does to a system of case disposition which has been used in the United States under the Constitution since 1789. It is a good system.

I repeat, the bar of the country, all of it, not only the national bar associations, but all of the State bar associations, at least on previous representation, wish to maintain diversity. And I respectfully submit that it shouldn't be nicked and knacked a little bit here and a little bit there because generally speaking it is a highly satisfactory and useful mechanism and by no means a large portion of the caseload we are speaking of.

Where the chairman and I have been in great agreement on previous hearings is the fact that you, the Congress, are dumping into the Federal courts all sorts of other matters which are creating the overload which exists. And that, plus the sentencing guidelines, does make it hard to move the cases. But diversity is not doing it, I respectfully submit. And it would be a mistake to attempt to limit the diversity jurisdiction by putting these peculiar financial arrangements in it.

In summary, I respectfully submit rule 11 as it has been modified is working very well and has improved civility at the bar. There has—I remind you, not been one single instance brought to your attention of a case which should have been sanctioned and was not since the rule was adopted. You have got a good thing going. And I respectfully submit that it should be allowed to play itself out and see how it works. Thank you, Mr. Chairman.

[The prepared statement of Mr. Frank follows:]

PREPARED STATEMENT OF JOHN P. FRANK, SENIOR PARTNER, LEWIS
AND ROCA, PHOENIX, AZ

My name is John P. Frank and I am the senior partner of the law firm of Lewis and Roca in Phoenix, Arizona. I attach my Who's Who identification to this statement and will say briefly only that I have my law graduate degrees from the University of Wisconsin and Yale Law School and prior to September 15, 1954, taught law at Indiana University and at Yale, in both schools teaching procedure. I have taught on shorter term bases at various schools in the United States and have lectured, commonly on either constitutional or procedural subjects, in many states. I am the author of numerous books and articles on court administration and procedure and constitutional and legal historical subjects.

I served on the then Supreme Courts Advisory Committee on Civil Procedure by appointment of Chief Justice Warren under the chairmanship of Mr. Dean Acheson from approximately 1960 to 1970. I was a member and from time to time chairman of the Arizona State Committee for Civil Procedure for some thirty years and have participated in and have appeared at all hearings by the Committee on the Rules of Civil Procedure from 1960 to the present time. I am serving now as an emeritus member of the present Advisory Committee on Civil Procedure of the Judicial Conference chaired by Judge Patrick E.

Higginbotham of the Fifth Circuit. I have repeatedly appeared before House and Senate committees on jurisdictional and procedural matters.

In connection with the matters presently before this Committee, I have been active in connection with them throughout their several year history. I have been particularly involved in respect to Rule 11 and can perhaps properly say that as coordinator of the Bench-Bar Committee to Revise Civil Procedure Rule 11, I was one of the moving spirits for the change. I attach the names of the Bench-Bar Committee to this statement; it will be apparent to you that it represents all parts of the judiciary, the bar and academia. I am appearing today at the request of the American Trial Lawyers Association. I am not a member of that group but have frequently been the coordinator of the group with other national bar organizations, including the American Bar Association. In connection with the adoption of Rule 11, I presented to the official committee and in the hearings before this Committee and the equivalent Senate subcommittee the views of numerous United States Court of Appeals Circuit and District judges, the leadership of the Litigation Section of the American Bar Association, the Board of Governors of the American Trial Lawyers Association, the committee on civil procedure of the American College of Trial Lawyers, and the views of numerous state bars. In this connection, I worked particularly closely with the New York bar and the outstanding chairman of its civil procedure committee, Judge Hugh Jones, formerly of the New York State Court of Appeals.

Due to the fact that the House of Delegates of the American Bar Association cannot pass on the recommendations to it of its Litigation Section

until its mid-winter meeting which begins on February 13, a week from today, I cannot and do not purport to present any official views of the ABA. However, in the course of my remarks I will tell you of the recommendations which the Litigation Section of the ABA has made to the House of Delegates. I take the liberty of asking that you keep this record open for at least three weeks so that the ABA, if it cares to do so, can add an official written statement. Similarly, the Executive Committee of the American College of Trial Lawyers cannot meet on this matter until the middle of this week. The American College had a substantial hand in the creation of the new and present Rule 11 and, indeed, originated its most important parts. I have reason to believe that it is quite likely that the College will wish to put in a statement on at least some of the matters now before you, including particularly Rule 11, and I ask that the record be kept open for the brief period requested in connection with possible ABA action so that the American College of Trial Lawyers can also be heard from.

Let me divide my statement into the background for the 1993 change in Rule 11, the present situation, and present proposal.

I. RULE 11.

A. Background of the 1993 Change.

Rule 11, as adopted in 1983, was described by Professor Charles Alan Wright as the worst self-inflicted wound in the history of the rules-making process. Seldom was an effort made with better intentions or higher purposes, but, as has been trenchantly observed by Professor Judith Resnik of the University of Southern California, most of the time rules reformers are mopping up after the mistakes of past rules reformers; the old Rule 11 was a brilliant example.

The old Rule 11 was a genie which came out of a small bottle and filled all available space. No one would have supposed in 1983 that it would be so consequential. The rule was short and in both prose and intention benign. It provided that every pleading, motion and other paper must be signed by the attorney and if there is no attorney, by the party. The signature then became a certificate that the attorney has made a reasonable inquiry and that to the best of his or her knowledge, information and belief, the document was well grounded in fact and warranted by existing law or represented a good faith effort to alter existing law. If the pleading or motion or other paper was found to have been signed in violation of the rule, the court was authorized to impose an appropriate sanction which could include an order to pay to the other party the reasonable expenses involved in countering the pleading, including attorneys fees.

Great oaks from little acorns grow. In the less than ten years after the adoption of old Rule 11, we had thousands of cases invoking its application. Asking for sanctions because of challenges to the allegedly good faith inquiry into either facts or law became a major industry. It became routine that the attorneys had a double duty, one to try the case and the other to try the opposing counsel.

The rule became more of a defendant's mechanism than a plaintiff's, but the defendants did not like it either. Approximately 75 percent of the sanction applications were against plaintiffs. Nonetheless, there were enough against defendants to create a mutual burden. Indeed, the Rule 11 operation was just as obnoxious to the leaders of the defense bar as it was to the plaintiff's

bar. The root goal was the desire to sanction frivolous cases. The underlying problem here is that the phrase "frivolous cases" has a happy ring to it as though it were saying something meaningful, when in truth this is false. One judge's frivolous case is another's serious question. In a Federal Judicial Center study, a group of judges who considered the same complaint divided fifty-fifty on whether it was frivolous.¹

The system was been particularly onerous on civil rights plaintiffs.

I do not pause with what I think were the substantive misfortunes under Rule 11 because the point that particularly concerned me was the grossly unreasonable and unwholesome burden it added to judicial administration. The American Judicature Society did a major study. That study reported that in 7.6 percent of the cases studied there were Rule 11 sanctions and in 24.3 percent there was some involvement without sanctions. That meant that there had been some kind of Rule 11 activity of a formal enough sort to be noticed in a third of the cases. This in turn means that a great number of time-consuming and dollar-consuming decision points have been put into the legal system.

When the attention goes from the frequency of Rule 11 in a batch of cases to the frequency of Rule 11 problems for lawyers in general, the American Judicature Society came up with the astonishing figure that 82 percent of the bar studied has had some Rule 11 contact. This was a terrible and costly burden to put on the profession. It was particularly undesirable because under Rule 11 there were no uniform standards. As I have mentioned, one Federal Judicial

¹J. M. Kassenkissen, *An Empirical Study of Rule 11 Sanctions*, 26 (1985).

Study, judges divided fifty-fifty as to which cases were and which were not frivolous.

The Judicature Society also spoke of the threat element in Rule 11, as lawyers charge each other. The Seventh Circuit study on the rising incivility of the bar, an appreciable part of it dependent on Rule 11 combat, illustrated the vices of this system. Exchanges between lawyers of the "I'm going to get you" variety don't help civility very much.

It was, in short, a bad rule that needed changing.

B. The Present Situation Under New Rule 11.

As against that background, I had the pleasure and opportunity to be coordinator on the Bench-Bar proposal to revise Rule 11. It included an astonishingly complete representation of the bar, the Litigation Section, ATLA, the College of Trial Lawyers, numerous state bars, and numerous judges and professors; the list speaks for itself. We asked for a very comprehensive revision of Rule 11.

We did not get what we asked for. I regret that. The plain fact is that the Rule 11 dispute reflects class difference within the profession. Most of the judges who have the Rule 11 power like it. The lawyers on whom it is exercised or feel its consequences do not. In the world of cats and mice, it is more attractive to be a cat. This is illustrated in the dissent by Justices Scalia and Thomas from even the modest Rule 11 changes which were made.

Nonetheless, while the changes are less than I would have liked, the improvements are noteworthy. A strenuous concern of the American College of Trial Lawyers was the provision in the 1988 rule that sanctions were mandatory.

If the judge found any of the triggering circumstances existed, the court had no discretion to waive the sanctions but was compelled to impose them. That aspect is changed by the new rule. Another improvement is that the sanctioning power was broadened to cover firms as well as persons who actually sign documents in court. Frequently the signer is a junior attorney who is simply doing what he is told. He is not a policy maker. It would have been better to eliminate any sanctions on such persons, but at least now the courts will have discretion to put the responsibility where it belongs, which is on the firm itself.

The worst feature of the 1983 rule, which I have already mentioned, is that the rule became a fee-shifting device. The Bench-Bar proposal urged that any sanctions under the rule should be paid into the court. That proposal was not entirely adopted in the new rule but long steps were taken in that direction. The Court adopted the views of Justice O'Connor in a recent opinion that there should be heavy stress on deterrence, not profiteering, as the rule's objective. Hence, the Committee provided that any sanctions "should ordinarily be paid into court as a penalty" and that fee shifting should be limited to "unusual circumstances." This is an improvement. In addition, the new rule provides that there shall be no sanctions if the offending pleading is withdrawn, and the objecting party must give the other side this opportunity.

A major improvement in the rule is its improvement on the notice, hearing and determination practices required before sanctions will be allowed. Anybody sanctioned must have a specific charge, must have a reasonable opportunity to respond, and the court must show its reasons on the record for any order it makes. This is particularly important because the court's order is

reviewed only for abuse of discretion, so there must be a record to show whether discretion has been abused.

Former Rule 11 created a situation which was simply intolerable. The present rule was urgently needed. You gave it your blessing in 1993, and you were right.

C. Problems Under HR 10.

The proposal to erase new Rule 11 and impose old Rule 11 by statute is unfortunate from several standpoints.

1. The new rule has already reduced the great load of satellite litigation created by the old rule and restored a great degree of civility to the practice of law. Lawyers are no longer required to attack each other. Under the old rule, if a lawyer failed to charge his opponent with all sorts of malfeasance, he might be guilty of malpractice to his own client. Please notice that this is very different from the fee-shifting proposal which is the next item on your agenda and to which I shall turn in a moment. Old Rule 11 was not a simple fee-shifting rule. It required the prevailing party to show that the losing party had mispracticed his profession to the point of unethical conduct. It precipitated what became an actual personal dispute between attorneys. All this added heavily to the caseloads of the courts.

Under the new rule, this satellite litigation has markedly diminished. We do not know, because the rule is so new, just how much it has lightened the court's load. Judge Higginbotham, the Fifth Circuit judge who is the current chairman of the Civil Rules Committee, has asked the Federal Judicial Center for a study on this point to determine how new Rule 11 is working out. But

while we do not yet have clear statistics, we do know from discussions throughout the country that there is much reduction in the satellite litigation. The reduction in satellite litigation presents the question of whether the new rule has become a toothless tiger, whether the diminution of the number of actual sanctions claims means that the bar can now be as irresponsible as it wishes.

The answer is a very clear "No." A portion of the new rule which is working extremely well is the safe harbor provision. Under the new rule, before a Rule 11 sanction can be sought, the party asserting the violation of the rule must serve a notice on his opposing counsel and give him a reasonable time to correct or modify the alleged erroneous or unsupported filing. If the adjustment is not made to the satisfaction of the lawyer making the demand, he is free to ask for Rule 11 sanctions.

The safe harbor provision works. It calls to the attention of the other side that there may be something too loose or erroneous in the papers, and it creates an incentive to correct these errors because of the potential of the Rule 11 sanction.

Let me give a brief, personal illustration. Perhaps two weeks ago, I had to file a pleading and counterclaim very rapidly, perhaps too rapidly, in a case asserting damages in the amount of many millions of dollars. The deadline precluded much meditation over the pleading. Shortly thereafter, I received a letter from opposing counsel telling me that a given portion of the pleading might be entirely unwarranted. The safe harbor provision of Rule 11 was invoked and I was given the rule-provided time to reconsider the matter. I wrote

in return that the pressures of life, including the necessity of preparing for and being at this hearing, made it impossible for me to examine his point so quickly and I suggested that we mutually agree on a ten-day extension of the whole case so that I would have time to check the point out. The other side was, thus, relieved of pleading for the extra time and the suggestion was quickly accepted. When I return, I shall examine the matter closely and either conclude to stand on my position and risk the Rule 11 sanction or, perhaps, discover that I was in error and amend my pleading.

This is the way the system is supposed to work. This is what is happening all over America. The name calling and epithet slinging which was a part of former Rule 11 practice is gone. I remember vividly a particularly moving speech by Chief Justice Burger on the necessity of restoring civility to the practice of law. New Rule 11 is a long step in that direction.

2. There is another consideration for leaving the current rule alone. That is that it has just been adopted, it has had only a year in which to operate, and its strengths and weaknesses are just now beginning to be evaluated. No objection to the rule was made by either house of Congress after full hearing in 1993. The rule should not be allowed to become a flapjack, to be turned over so casually.

I met recently with a large aggregation of representatives from all of the major bar associations, including some thirty or more of the state bars. The general sentiment expressed was that the Rules Enabling Act provides a good, thoughtful method of making rules by committee, with hearings, and with final consideration, both by the Supreme Court and Congress. This bill simply end

runs that whole process, eliminating committees, eliminating the Supreme Court, and moving the matter entirely here. I fully respect the fact that the Congress can make such rules as it desires, but the exercise of the power should be with restraint. The Judicial Conference should not be bypassed in this fashion without even an inquiry as to whether a rule change should be made.

3. The report of the Litigation Section of the American Bar Association, which will be before the House of Delegates next week, speaks of old Rule 11 as "a colossal waste of judicial time." As the report said, "Things had obviously wandered far afield when there existed exposure to sanctions for asserting even meritorious positions in good faith." The conclusion of the Litigation Section was:

This restoration of the status quo ante would ignore all experience under the 1983 version of Rule 11, exacerbate its worst features, and resuscitate and accelerate the enormous amount of judicial time and attention devoted to nonsubstantive motion practice. It should not be enacted into law.

I respectfully that the Litigation Section is quite right. I renew my expression of hope that you will keep this record open so that the American Bar Association and the American College of Trial Lawyers can be heard.

II. THE LOSER PAYS PROPOSAL.

In respect to this proposal, I adopt as my own the recommendation of the Litigation Section of the American Bar Association to its House of Delegates:

H.R. 10 would reverse the prevailing rule in the federal system and provide that the attorneys' fees and expenses for a prevailing party be paid, upon application to the court, by the losing party. The court would have the discretion to reduce such an award if it concluded that the prevailing party had engaged in conduct during the

proceeding, which unduly and unreasonably protracted the final resolution of the case.

The hallmark of the ABA has been the goal of providing access to justice for all. The "loser pays" provisions of H.R. 10 would also undo much of the good that has been accomplished on access to justice issues.

This provision would end class actions and virtually all other security actions by victims of fraud. By definition, a securities class action is a suit by one or a few investors who have lost relatively small amounts of money and who sue on behalf of all those similarly injured. No victim will stand up and sue as the champion of the class if the risk -- under the English rule -- is paying millions in attorneys' fees incurred by insurance companies, public corporations, investment banking houses, accounting firms and law firms. Access to the courts by all will be seriously undermined. The English rule is simply inconsistent with the class action device.

Moreover, the provision cannot be fixed by changing the standard to shift fees on the basis of a lower standard. The in terrorem chilling effect exists because of the possibility that fees will be shifted; therefore any threat of a fee shift would be sufficient to deter a plaintiff from pursuing a class claim. As Professor Arthur Miller of Harvard Law School so cogently testified last summer:

"As a practical matter, fee shifting is almost invariably an intimidation device designed to inhibit people from seeking access to the courts. Fee shifting would eviscerate all -- or virtually all -- plaintiffs' securities claims, the meritorious along with the meritless. The practical mathematics of deciding whether to bring a lawsuit are clear. No one except the extremely wealthy -- no matter how strong his or her claims appear to be -- would assume the risks of pursuing a class claim against well-researched defendants with counsel who are compensated on an hourly basis if there was any risk of having to pay the defendant's attorneys' fees. That would create a risk that would be hundreds, if not thousands, of times as great as the loss of any individual class representative.

"Litigation success from the plaintiff's perspective is never certain at the point of institution. Therefore, it does not matter much whether fee shifting is mandatory or discretionary with the court, or even what the standard for imposing it is. As a practical matter, in the context of class actions under the antifraud provisions of the federal securities laws, even a remote possibility that the class representative would have to pay the legal fees of defendants would be a major deterrent to anyone seeking to remedy a justiciable wrong. Who would risk the staggering legal fees if there was a chance the defendants would prevail in a civil suit -- leaving the loser responsible for the fees?

"The 'loser pays' proposal in class actions is radical and inconsistent with traditional American values involving equal access."

I would add to what the Litigation Section has said one further observation. The loser pays provision is hard on plaintiffs and will, as suggested by the Litigation Section, keep some of them out of court. But my own practice is largely on the defense side, and I must bring to the attention of the Committee that this is very bad from a defense standpoint. The realistic fact of the matter is that the deep-pocket defendants will normally be able to pay the other side's fees. A great many plaintiffs will not be able to pay and will avoid their responsibility because of insufficient funds. Bankruptcy will become an easy out. The practical effect of this provision is that defendants who lose will generally be paying the other side's fees, but as a practical matter plaintiffs who lose will frequently not be paying. This imbalance is highly undesirable.

Thank you for the opportunity to appear before you.

Mr. MOORHEAD. Mr. Foster.

**STATEMENT OF JOHN FOSTER, P.E., FORMER PRESIDENT,
AMERICAN CONSULTING ENGINEERS COUNCIL**

Mr. FOSTER. Mr. Chairman, members of the subcommittee, like Mr. Bono, I am not an attorney. I am here simply as a businessman who, for 40 years, has been trying to run a consulting engineering firm doing projects across this country and around the world.

I am speaking today as a former president of the American Consulting Engineers Council, an organization of 5,000 member firms and 200,000 employees across the country.

As you pointed out in my introduction, members of the organization design over 100 billion dollars' worth of public and private works a year. That is probably two-thirds of all the design and construction activities in the country. About 80 percent of these firms are small businesses, 30 employees or less. My firm is relatively large with 1,100 employees but mostly we are talking about an organization of small business people.

ACEC has been concerned about the issues of legal reform for some period of time. We are a founder of ATRA, the American Tort Reform Association, some 15 or 18 years ago; and a founding member of CCJR, the Citizens for Civil Justice Reform. Both of these organizations have joined more recently to work on H.R. 10. Some 300 different organizations are involved in this activity. And these folks cover a broad range of service and product providers, and that introduces my first recommendation.

Somehow, we would hope that you could broaden this legislation to include the service sector, which is now larger than the manufacturing sector in this country.

Some have argued that it would muck up the bill to include service providers in it and a separate bill should be provided. But it seems to me you are on the right track and that the proposed legislation should be expanded to provide coverage for the service segment.

It is kind of interesting, the McDonalds suit that we have talked about here recently this morning several times, this morning would not be covered under H.R. 10.

Our firm has been in business for 100 years. We have been sued by three clients over that time. But we are now being sued on the average of about once every 6 weeks. Something is wrong with the system. Frankly, Mr. Chairman, we are a bunch of "good guys." Imagine how often the bad guys get sued.

Let me tell you the kind of nonsense that we have to encounter.

We recently finished the design of a very large wastewater treatment plant in Texas. The project was spread out over a number of acres. The contractors, because they were being robbed by local citizens, decided to hire a large night watchman service.

One morning I was called to the front of my office in a reception room and I was served with a summons and complaint from an individual in Texas who was a night watchman working for this group. Apparently, one dark and stormy night, the papers read, he was out patrolling his sites. While walking down beside the trench a skunk jumped out from in back of a piece of pipe. The skunk so

startled our watchman friend that he jumped into a trench and was hurt by falling on some reinforcing bars and concrete at the bottom of the trench. So naturally his attorney sued everybody in sight; the guys who made the trench, the consulting engineers, the city, the county, all of the other subcontractors on the site, and everybody on the site, except that four-legged skunk who got away scot-free.

This is typically the kind of cases. When I say a case every 6 weeks, that is what I mean by that. But on a pro rata basis that is the kind of frequency that our profession is seeing in the size of their firms. The average company in our organization gets sued about once every 18 months.

I urge you to extend the scope of H.R. 10 to cover services.

I don't understand all the issues involved, but I think we have some of the same problems that others have talked about this morning. There are a number of other provisions I think that should be added. A certification panel would help a lot to try to decide what claims are meritorious and what are not.

I believe that States like California have shown some outstanding advantages in doing that. There are a number of other leading tort reform States.

Second, I would suggest that you try to do something to prevent disputes going all the way. Much of this could be avoided if we could find better ways to solve disputes upfront. Much of the discussion this morning has been on the cases going all the way and the court deciding. Why does it have to be this way.

Everything doesn't have to go before a judge, it seems to me. Using various alternative dispute resolution techniques like mediation would be a big help. There is a lot of progress being made in that area and more is needed. So I think changes in the legislation would encourage major support from the organizations that I have just mentioned.

Why do consulting engineers need help? Surveys show that 41 percent of the claims against engineering firms are resolved without any payment to the claimant. That doesn't mean they are all frivolous but somehow they are resolved in an effective kind of way. We recognize that sometimes an unfair, unjust settlement upfront is far cheaper than a very, very fair settlement down the road.

We spend a lot of time trying to resolve disputes early. With attorney fees and time involved, it is a tremendous cost to our firms. The average cost in insurance among our member firms is about 2.5 percent of billing, a big piece. When you stop and think that profits are running 5 to 10 percent, you can see that 2.5 percent of billings is a big number, more than the profit of many of the firms in our organization.

Let me take a few moments to touch on other problem areas. About 14 percent of our firms go without insurance because insurance is so expensive. Surveys show that 90 percent of our firms have turned down work because of the high threat of liability in the kind of work that we do. Three-quarters of these folks tell me that liability threatens innovation.

Why aren't we pushing the envelope? Why aren't we doing things in a more innovative way? Why are we trying to save money in our

highway design and our airport design? Why aren't we designing it in a tried and true kind of way?

Congress, in 1972, when holding hearings on the issue of innovative and alternative design in the wastewater treatment plant program, decided the major question was, who will pay for innovative blunders? We can't risk going to court every time we push the envelope of innovation. At that time, the Congress decided that Congress should pay the cost of innovative blunders unless they result from negligence.

We are responsible firms and accept the responsibility for the negligence caused by us. It seems to me we should not have to pay for someone else's negligence, so I would certainly think we must restrict joint and several liability. This is a tremendous problem for those working on the Superfund program of toxic and hazardous waste. Since the engineer may be the only guy left in town when others have gone, we are expected to pay when difficulty develops? That is not fair and that is not right.

The pretrial phase needs some work. We find that some pretrial activities are a disgrace. The extended amount of discovery that takes place, the long, drawn out searching of records and getting copies of files. We are involved in a suit where it will cost collectively some \$250,000 to copy the many files. Lord knows how much discovery is going to cost for a dispute that I believe could be settled by reasonable people sitting down and talking it over. The attorneys have looked upon this case as a gold mine. I am afraid it probably is.

I don't want to get into the loser-pays concept. It has been talked about so much this morning. I think there are a number of situations that could be improved in that respect and there are many, many ways to make it all work. I think certification panels should be created to help discourage frivolous suits. I think that would be a good and worthwhile thing to do.

In conclusion, Mr. Chairman, change is needed. I think the speakers this morning have said that and I believe that strongly. As a minimum, we need to reduce problems of joint and several liability and we ask that H.R. 10 be expanded to cover the service sector of our economy.

I think expansion of rule 11 all the way through the discovery process is needed. I understand it is supposed to work that way, but I haven't heard of it happening.

I mentioned alternative dispute resolution, I think those are important things to do. I will move along and I thank you for letting me have the opportunity to testify before you today.

[The prepared statement of Mr. Foster follows:]

PREPARED STATEMENT OF JOHN FOSTER, P.E., FORMER PRESIDENT, AMERICAN CONSULTING ENGINEERS COUNCIL

In the time it takes me to give this testimony over 100 lawsuits will be filed in this country. That is why we are here! That is why I am here!

Mr. Chairman, my name is John Foster and I am pleased and honored to appear before the Courts and Intellectual Property Subcommittee of the House Judiciary Committee. I want to thank you for giving me the opportunity to testify on the issue of why and how our nation's legal system is badly in need of reform. Service firms, especially engineering companies, are predominately small businesses made up of talented and dedicated professionals who are trying to make people's lives safer and

healthier. But the flood of litigation is paralyzing their businesses and tying up scarce resources.

I am here today representing the American Consulting Engineers Council (ACEC) as its past President, and Malcolm Pirnie, Inc., a multidisciplinary firm of engineers, scientists, and planners located in White Plains, New York.

ACEC is a national organization composed of approximately 5,000 private consulting engineering firms with some 190,000 employees. Seventy percent of our member firms are small businesses, with 30 employees or fewer. Reforming our nation's legal system is and has been a high priority for our members. In fact, in 1986, we founded the American Tort Reform Association (ATRA) which has become one of the leading voices on the need to fix our broken legal system.

We also are founding members of Citizens for Civil Justice Reform (CCJR) another broad coalition which, together with ATRA, represents everyone from the Council of Community Blood Centers to the National Federation of Independent Business, from the family doctors to Amway salespeople. For years we have been working hard on the state level, as our state organizations have fought side by side with civil justice reform activists in promoting common sense legal reforms such as pre-trial screening panels laws, statutes of repose, and comparative fault laws, to name a few.

The "Contract with America" contains several provisions that, if signed into law, will help make American businesses more competitive and create more jobs. One of the most important planks of the "Contract" is The Common Sense Legal Reforms Act. Congress must act before more innocent professionals, small business people, consumers and municipalities get hit with "shotgun" litigation. No one is immune. And we all pay the price.

I know about it firsthand. My firm got hit with "litigious buckshot" in one particular case and it wasn't pretty. In fact, in this case it stunk—both literally and figuratively. Several years ago, I was involved in a case involving a skunk. We had designed a waste water treatment facility. One night a night watchman came upon a skunk. Yes a real live skunk. In fleeing from the skunk he injured himself. A minor "slip and fall" case became a million dollar lawsuit in which the night watchman decided to "sue the world." He sued us, as the designer, he sued the contractor, the subconsultants, and the owner, a large municipality.

But I did not come here to merely rattle off a list of outrageous suits. I want to talk to you about the real life economic impact of these suits on consulting engineers and our industry, but also on the entire economy and on the quality of life in America.

LAWSUIT ABUSE HURTS REAL AMERICANS

Over the last 60 years, legal costs have grown almost 400 percent more than the economy. The United States spends two and a half times more than the average industrialized nation. Unreasonably high litigation costs erode our standard of living and hinder our international competitiveness. This impacts both the products and service industry sectors of our economy.

American small business is hurt by the frequency of frivolous lawsuits filed against them. Consulting engineering firms provide a window into the world of what is happening to individuals and small businesses around the country. ACEC's 1994 Liability Survey reported that 41% of the claims brought against engineering firms are resolved without any payment to the plaintiff yet the firms spent an average of 135 hours per case and tens of thousands of dollars. That's an enormous cost, not to mention the firm hours lost—for doing nothing wrong.

American "Know-how" is in jeopardy when 72% of the responding engineering firms said that the threat of liability hampered the use of innovative technology. An amazing 90% of our member firms told us that they have turned down work in the past year because of the threat of liability.

America is losing its competitive edge in certain industries because this is one of many hidden taxes placed on our firms.

ATTORNEY ACCOUNTABILITY

The attorney accountability provision in H.R. 10 is the type of law that we need and it should be binding in all states. Just as we have Truth-in-Lending laws when someone buys a car and takes out a car loan, parties to a lawsuit should understand up front what the costs are going to be.

SANCTIONS AGAINST IRRESPONSIBLE TRIAL ATTORNEYS AND THEIR CLIENTS

The small percentage of attorneys who abuse the litigation process and file what they know are completely baseless claims against innocent defendants should be penalized. My attorneys tell me it's called a Rule 11 and not used very often. When it is used it is difficult to obtain from judges who are reluctant to find a violation. However, sometimes it is used effectively. In one celebrated case the controversial former Attorney General Ramsey Clark was sanctioned with a Rule 11 after he sued President Reagan, Margaret Thatcher and the government of Great Britain demanding that Libyans who were injured after the 1986 bombing should be reimbursed for their losses. Section 104 of H.R.10 is a good start that "gives teeth" to this provision. However, it does not go far enough. For example, some of the worst abuses by lawyers are the "fishing expeditions" during the discovery process. Rule 11 must apply to discovery and not just conduct during trial.

I have had colleagues tell me that they would have filed Rule 11 sanctions against attorneys but there are some powerful reasons not to. Usually, these involve costs. One consulting engineer wanted to file a Rule 11 suit against an attorney who filed a frivolous lawsuit against him. His insurance company notified him that they would cover more of his costs if settlement were accepted. Part of the settlement, drafted by the opposing counsel, included a provision waiving the right to file a Rule 11 suit against that attorney. By addressing this issue, Congress sends a powerful message to those who would unfairly trample on the rights of the innocent defendant: stop abusing the process for your own gain.

Rule 11 should be used responsibly by parties who are unfairly treated by the small percentage of unscrupulous contingency-fee attorneys. Just as engineers, doctors and widget-makers are held accountable for their actions, so too should lawyers be accountable. My message to everyone is simple accountability is a two-way street.

REAL REFORM IS NEEDED NOW

America has moved into a service and information economy. Litigation costs, both direct and indirect, are one of the biggest hindrances to sustained growth and international leadership. Real legal reform must reduce the frivolous suits that boost all costs from health care to the price of a ladder. And reform is needed to encourage the development of innovative technologies by our most creative minds who often are hindered by the threat of litigation.

The following are a few suggestions to help fulfill the promise of the "Contract with America" which is intended to put reasonable limits on damages, common sense reforms to reduce frivolous lawsuits and standards to streamline the civil justice system. The following are provisions that would establish uniform liability law reform for services, some of which virtually mirror those provisions currently contained in Section 103 on product liability.

Comparative Fault (Joint and Several Liability Reform): First, there is unanimity from groups as diverse as the National-American Wholesale Grocers' Association and accountants, from cities and states to engineers in the desire to replace unfair joint and several liability laws with proportionate fault so that damages are paid in proportion to responsibility. The states are leading the way in changing their joint and several laws and Congress must act to ensure that no one in America has to pay for the misdeeds of others.

Six-year Statute of Repose: We propose a national statute of repose that would help to set reasonable time limits for initiating lawsuits. This reform would help ensure that a defendant cannot be held liable for injuries decades after the service in question was performed, yet still permitting legitimate plaintiffs to bring a suit against those that have control over the circumstances about the time of the injury.

Frivolous Suit Protection: We propose 1) Certification Panel legislation that would help to weed out frivolous lawsuits before they get to court, as well as targeted fee shifting in the case of a litigant who brought a meritless claim and lost, or, a litigant who was offered a settlement, sued anyway, and was finally awarded less than the original settlement.

Service Liability: We support a law where "junk science" shall be reduced by, among other things, a requirement that the scientific and technical information used to establish reasonableness exist at the time and place of the occurrence and that the opinion be based on scientifically valid reasoning. Also, compliance with government specifications should not open the door to frivolous suits against professionals.

Alternative Dispute Resolution: Our industry suffers from a great deal of litigation between parties to construction projects. Much progress has been made to promote ADR and when used, I understand from our insurance firms, it cuts

down on costs. The use of ADR has been shown to be an effective method of resolving claims before the litigation battle begins.

Collateral Source Benefits: We support full disclosure of benefits to plaintiffs to deter "double-dipping" and reduce any award of damages if plaintiff has received payment from a collateral source in order to eliminate multiple recoveries for a single injury.

These provisions would apply to actions commenced in federal and state courts. This legislation would not supersede any state law that provides to professionals limitations of liability or defenses that are additional to limitations or defenses contained in this Act.

CONCLUSION

As I mentioned at the start of my testimony, over 100 suits have been filed since I began. Before you adjourn for the day more than 50,000 claims will be filed. Most have some merit and are valid claims. But do all of these matters have to be settled with lawyers battling each other. I earnestly believe that we have common sense on our side. Fairness, accountability, openness and greater access to the courts are goals that we can all agree on. Everyone deserves the right to their day in court. And everyone deserves a fair court. But everyone also deserves the right to strive for business success in this country without the constant ominous threat of groundless expensive litigation. I urge you to seriously consider these concerns because they have such far-reaching impacts—impacts that reverberate throughout both the economic and social fabric of America.

If you remember nothing else you hear today, remember these 3 things:

Number 1. Rampant, unbridled misuse of the legal system is hurting entrepreneurial spirit in America—it is paralyzing us, sapping our innovative instincts and costing us big money.

Number 2. We need to make attorneys accountable for their actions, and we need to ensure that complaints litigated in our courts are substantive and valid.

Number 3. Finally, you cannot ignore the critical importance of services when you enact tort reform. Services support and nurture our economy, and they need your special attention.

Thank you for this opportunity to come to Washington and testify before your committee.

Mr. MOORHEAD. Thank you all very much.

I will begin the round of questioning and try to keep it to 5 minutes for each Member until we go around and if we need, we can have another round.

Mr. Frank, I know we have had some differences. I don't bash the law profession, because I practiced law for 23 years.

Mr. FRANK. I defer to your seniority.

Mr. MOORHEAD. I do know that most of the problems we have with lawyers are caused by maybe 5 percent of the lawyers. You know yourself that there are some that need to have someone to hold them in line. The victims usually are other lawyers that have to stand for unnecessary delay or all kinds of procedures that can come about in court that are certainly not helpful to the legal profession.

In your written statement, you indicate that the changes made in rule 11 in December 1993 were modest, but you know some of the things that happened were these. There is no longer a requirement for lawyers to inquire about the facts before filing a pleading or paper, the so-called "stop and think" requirement.

I know you are going to say there is, but when litigants and lawyers are permitted to withdraw challenged pleadings in order to avoid sanctions, it certainly does away with the real teeth of the requirement that they stop and think before they file those papers. That gives them a chance to do whatever they want and go back if they are called on it and do away with any possible penalties that they might have.

The mandatory sanctions that formed an important part of the 1993 rule changes have been replaced with the discretionary sanctions. Also, the prospects for compensating aggrieved opposing parties have been greatly reduced. It would appear to me that under the new rule 11, frivolous and abusive conduct is going to be much harder to control.

I would like to know what your comment is on that. I am not trying to bash lawyers. I want to protect them and their clients and the courts from things that I feel are abusive.

Mr. FRANK. I am keenly aware of this. I have appeared before you repeatedly. I know you are sympathetic to the profession's problems. I do ask you to take into account that if you will allow it to happen, the entire profession, virtually every bit of it is going to be asking you, please don't make this change. That clearly reflects reasonably learned judgment. I have included in my statement the statement of the litigation section of the ABA which you probably were a member of in your practicing days, overwhelmingly saying this is a bad idea. You raise the possibility that the modified rule which encourages people to correct their mistakes if they made them may make them careless and cause them to be irresponsible in the first place.

Mr. Chairman, I respectfully submit that if that were happening, if that were not mere speculation, surely somebody would have come in here, your staff would have come up with some instance in America in which this enormity has occurred. My friends on my left from the insurance industry would have concrete examples of these abuses. There aren't any.

I am appearing at the invitation of ATLA. I am not a member of ATLA. I respect it very much. I have coordinated it with the American College and the American Bar frequently but my practice and firm, my practice and I are on the defense side. That is where I have made the bulk of my living and I do today.

What we were finding under rule 11 was an endless series of costly abuses with the satellite litigation which occurred. We also found, as the Seventh Circuit Committee of the Bar reported, a great increase in instability because of the pressure on lawyers to attack each other. If you can get fees out of the other side by charging that he somehow did something wrong, then it puts pressure on you from your client's standpoint to do just that—3,000 cases.

Mr. Chairman, if the subsequent abuses had happened, you would hear about them, and you haven't heard about any. I submit that under the rules process, we ought to give this new rule a fair chance to work itself out. You are not going anyplace, and if 2, 4, or 6 years from now it appears there are abuses, if the Federal Judicial Center reports this isn't working very well, you will know about it. But until that happens, this is a clear case, if ever there was one, if it ain't broke, don't fix it.

Mr. MOORHEAD. Those 3,000 cases are from when to when?

Mr. FRANK. From 1983 to 1993 and fully documented in the literature. I have been before you repeatedly on behalf of judicial administration and that was a terrible curse to judicial administration.

Mr. MOORHEAD. With the literally hundreds of thousands of cases that were filed over that period of a year, I would think that would be a fairly small number.

Mr. FRANK. It was a rising scale. They tend to be big ones. Remember, they get filed but most, of course, don't go to litigation so that it became really a heavy burden, and the worst was the hostility it was engendering. I am not making a speech when I say, first, you try the case and then you try the other lawyer. It is a bad way to have a professional relationship.

Mr. MOORHEAD. I hope that isn't quite true. I know that the lawyers aren't unanimous on this, because I am still an active member, although I don't practice any law, a member of the bar where I have been president. I know that there is a substantial difference of opinion in the bar on this particular subject. People that get to the top levels of the American Bar Association are not a good cross-section of the bar association itself. You know that.

Mr. FRANK. May I make a comment to that point, sir?

Mr. MOORHEAD. Yes.

Mr. FRANK. I think it is extremely interesting—this is now my third hearing on this subject, because we had two before the rule was changed, and at all these hearings there has been only one voice in support of old rule 11. If there were some real bar sentiment in favor of going back to what may seem to some the good, but to me the bad old days, you would have had some bar here. Every national bar association you will hear is opposed to this proposal.

Mr. MOORHEAD. Mr. Foster, I notice new rule 11 is made inapplicable to discovery proceedings. Was old rule 11 used much in discovery proceedings? I would think a lot of abuse that occurred was in discovery.

Mr. FOSTER. I can't answer that question. I agree that that is where I see the large share of the problems taking place. It is endlessly drawn out, expensive and unnecessary.

Mr. FRANK. While I am completely sympathetic to Mr. Foster and would like to work with him on many of these things, the discovery abuses are gross.

The answer, Mr. Chairman, is simply that the sanctions problem in discovery is covered by rule 37; so what the rule did was to make clear that general sanctions would be under rule 11 and discovery sanctions would be under 37, and that is a fully effective rule.

Mr. MOORHEAD. Ms. Ballen, do you have comments on either this question or the one I previously asked?

Ms. BALLEEN. Yes, I do. I would like to make clear for the record that as part of my presentation for this hearing, it never occurred to me to find the one or two or three documented cases of abuse that have occurred over the past year, so my failure to cite such cases simply relates to the fact that it was not part of my preparation and really does not relate to my view of what has happened over the past year.

With respect to where this Congress stands on the issue of whether the rule should be changed so quickly, I would like to paraphrase from Mr. Frank's testimony when he said, if it ain't broke, don't fix it.

I guess that was our view of the 1983 rule and that was why we testified before this committee in support of that rule, because we felt if it ain't broke, it shouldn't be fixed. We commend you for taking early action in recognizing that it might have been a mistake; in fact, we believe it was a mistake to make the changes that occurred last year.

With respect to your second question on discovery, I think the American Judicature Society empirical studies suggested that discovery was about 20 percent of the motions that were filed under the old rule 11, so it certainly was used. I am not really familiar with how it now relates in terms of blending it into the other rule that Mr. Frank alluded to, but certainly we think it is important to sanction discovery abuses just as we think it is important to sanction abuses at any stage in the litigation process.

Mr. MOORHEAD. I understand that my time has been used up, so I will ask the gentlelady from Colorado.

Mrs. SCHROEDER. Thank you, Mr. Chairman.

Mr. Frank, it sounds like you are saying this is *deja vu* all over again, that we had this experience——

Mr. FRANK. In 1993, you weren't here at the hearings. Are you a new kid on the block on this committee?

Mrs. SCHROEDER. Yes. I got off the subcommittee for 2 years so it sounds like I missed that round. But your fear is that if we pass this, we will go back to where we were and it is like 1993 didn't happen?

Mr. FRANK. Yes. This is exactly what we were trying to escape.

Mrs. SCHROEDER. You said that what we have learned from the 1983 version is that rule 11 was particularly onerous on civil rights plaintiffs?

Mr. FRANK. Yes, because you get, particularly in the civil rights field where either poor or disadvantaged persons may well be the plaintiffs, they are likely to have less skillful attorneys so there will be more mistakes. But it is also an opportunity to slash them to pieces and that was happening. There are horrendous tales there of abuse.

The gross number, I want to get that straight, because there is a study of the Judicial Center on the exact point—the gross number is not so high but that is because the gross number of civil rights cases is not so high. The proportion was very high.

Mrs. SCHROEDER. I know the chairman was saying I think he was a little suspect about the bar being against rule 11 as it was in 1983. I have a quote from Judge Sam Porter who was the Chief District Judge in the Northern District of Alabama and I think was Chairman of the Judicial Conference——

Mr. FRANK. He was Chairman of the committee which originated the rule which it is now proposed to abolish.

Mrs. SCHROEDER. He said, many thousands of cases in which rule 11 motions were brought with a relatively small percentage found ultimately to have merit by the court resulted in a tremendous onerous burden on the court. Obviously that was from what, the 1993 hearings?

Mr. FRANK. Well, Judge Pointer was Chairman of the committee which sponsored the rule which you are now being asked to eliminate. Judge Pointer is one of the country's outstanding judges,

some of you will know him by repute. That observation could have been in a committee report or a speech about the necessity of modifying the rule. My own interest has been from the standpoint of judicial administration. It did put a very onerous burden on the courts.

Mrs. SCHROEDER. I think you said that the reason we haven't heard from them or others yet is they haven't had time to reconvene but you would assume their positions would be basically the same?

Mr. FRANK. I have included in my statement the report of the litigation section, which is the biggest section of the American Bar Association and the one dealing directly with this subject, which wholly opposes this proposal, but that cannot become official until the house of delegates adopts it next week.

I quoted it at some length and I hope that you will be able to keep the record open long enough so that you are not just hearing from this tiny fragment of the bar that happens to be here today.

Mrs. SCHROEDER. The Judicial Conference, will they—

Mr. FRANK. The American College of Trial Lawyers will have a report by the end of the week. The Judicial Conference study will take longer. I would imagine in their usual—forgive me—Federal Judicial Center has been asked by the Judicial Conference Committee to study this and get some hard data on how the new rule is working out. Now it will take them some time to do that if they proceed thoroughly, and I think they will.

Mrs. SCHROEDER. So you assume that the Judicial Conference is not going to take any action until they see their study? Is that correct?

Mr. FRANK. That is correct. You have an elaborate structure under the Rules Enabling Act for assessing information, making proposals, having national hearings and bringing them finally to you. And it is proposed now that that be cut off at the pass and it be junked and the Judicial Conference be tossed out the window and you go back and pass this miracle and that seems to me a regrettably precipitous way to do rulemaking.

Mrs. SCHROEDER. Mr. Foster had some interesting comments in his testimony about rule 11. I think we dealt with the fishing expedition and discovery by finding that was another rule. Mr. Foster also says that he had heard cases where when you went to settlement, I believe you said, Mr. Foster, counsel would draft a provision waiving the right to file a rule 11 motion against that attorney, and also that many people said that they didn't file under rule 11, even though they thought they had an action, because of the cost.

Now I would like you—

Mr. FRANK. If under the previous rule you wish to contend that the other side had filed pleadings for which they had no adequate basis, that starts a whole new independent lawsuit. You have just doubled your caseload because there has to be discovery as to what was the basis, how did you know this, what did you look at, what did you do, et cetera. What has happened is that you have made two lawsuits bloom where only one was growing before.

Ms. BALLEEN. This issue of satellite litigation is something that has received a lot of attention. The American Judicature Society,

one of the questions they asked of lawyers who had been involved in such activity was how much time did they spend on it. I think somewhere in the neighborhood of 60 percent said 10 hours or less and 50 percent said 5 hours or less. So it's not a completely insignificant amount of time, but not a tremendous amount of time.

From the point of view of judges, when the Federal Judicial Center asked them whether they thought the time that they spent on rule 11 issues was justified, an overwhelming percentage of them said that it was; in fact that it is a cost-effective rule from the point of view of the judges who are in a position of administering it.

I am obviously not familiar with the facts of Mr. Foster's cases that he cited but to me, one of the major benefits of rule 11 is that you can get in early and take action when a particular abuse or suspected abuse occurs, so you are less likely to run into a situation at settlement 6 months or 6 years later on the question of whether to bring a rule 11 action against the initial pleadings—that would not be relevant.

Rule 11 allows a policing mechanism, if that is what you want to call it, to occur when specific things happen and to us that is one of its major advantages as a litigation management tool.

Mrs. SCHROEDER. Mr. Frank.

Mr. FRANK. Would you be kind enough to ask me if there was something I overlooked in my initial statement?

Mrs. SCHROEDER. Yes. Was there something you overlooked?

Mr. FRANK. As a matter of fact, there was. On the loser-pay thing—because I was extemporizing—I am concerned about loser-pay from the standpoint of the defense bar and of the defendants, the kind of clients that are, for which Mr. Foster is perfectly representative.

As this is structured, the deep-pocket defendant is always going to get stuck. This was brought to your attention in the earlier hearing, and this really concerns me. There are going to be a lot of plaintiffs who are judgement-proof or who are able to take bankruptcy if there is a large judgment against them, so it is going to end up that a good number of defendants are in effect going to be paying twice.

They have to pay for their sins and they end up not getting anything, so they pay the full cost in the other case as well, and that seems to me highly undesirable and unfair, and there is no system in this rule to cover that sort of thing.

Mr. FOSTER. I wonder if I could add something to that. We find that one of our major problems is that the other side comes in with enormously high claims, way above and beyond what appears to be reasonable, so high we can't even sit down and talk about settlement. It seems to me, the loser-pay thing, somehow there must be a way to encourage people to come in with reasonable numbers up front, because I believe firmly that many disputes can be settled, particularly in construction, without going all the way.

Mrs. SCHROEDER. So you are saying you would like something that looked at the initial request that they were making that they are treating it like they won the lottery?

Mr. FOSTER. Yes. Maybe the difference between the initial claim and the final arrangement might be considered to be an expanded piece that might be subject—maybe the loser should pay that piece

rather than the whole thing, because I understand the problems of poorer people trying to get involved in this process. It is supposed to be equality for everybody.

Mrs. SCHROEDER. I appreciate your comments, that you do understand that, and you really do feel that there is a legitimate reason that everybody should be able to go into court. I think all of us would have great sympathy for that too; but that if somebody has a \$10 claim and they are trying to make it into a \$10 million claim—

Mr. FOSTER. Just an associated point. In my travels around the world working with many different engineering and architectural firms in many parts of this world, they are scared to death of coming to the United States to set up operations because of the liability issues, and it is fun to do business in their countries.

Mrs. SCHROEDER. Maybe that is good though. Some of the others who have come in have run us out of town.

No, I am kidding. Thank you.

Mr. FOSTER. That is a serious comment because that is exactly how I feel and I tell them how tough it is to practice here.

Mr. MOORHEAD. Mr. Hoke.

Mr. HOKE. Thank you, Mr. Chairman.

A couple of observations regarding some of the things Mr. Frank discussed. First of all, it seems to me that 3,000 cases over a 10-year period is not a particularly significant number, that is 300 per year or 6 per year per State, knowing of course that they wouldn't be divided that way because of the population differences, but it strikes me that is not a particularly significant number.

And I would go on to say that if there haven't been any such cases brought in the past year, that it is not surprising that we wouldn't know those as opposed to the ones where the cases are brought. If you eliminate or if you make the rule much more restrictive in terms of what you can bring, then clearly you are not going to have as many cases brought under the rule.

What you say, and Mrs. Schroeder pointed out, and page 5 of your testimony, the old rule 11 was "particularly onerous on civil rights plaintiffs." I would like to know what your evidence is for that. According to the Federal Judicial Center's 1991 study of that specific issue, they found that the imposition rate of sanctions in civil rights cases was not out of line with those in other types of cases.

And as far as your assertion that the "new rule has already reduced the great load of satellite litigation created by the old rule," there was a study in 1992, the American Judicature Society study that concluded that assertions that large blocks of lawyers' time were being devoted to rule 11 activities are not substantiated by the data. It seems to me that there is a lot that is in contravention of that.

The last thing I want to say, and I would like to get your response, is that you say that this—that the loser-pay rule would, in the case of a defendant losing or in the case of deep-pocket defendants, it would make absolutely no difference. I think you are completely mistaken. You are saying that it would be very different. I think that there is no difference than it is today.

The defendant pays now both ways. The defendant pays when he loses and when he wins. He pays when he wins because he is responsible for his own fees and he pays when he loses because the fee is 99 percent of the time on a contingent arrangement and that fee is reflected in the amount of the damages.

I think that the market would adjust to that rather quickly. So I don't see where you make that assertion that it would be a different situation. I think it would be absolutely identical.

Mr. FRANK. May I respond to each point?

First, the 3,000 cases are cases that actually came to litigation. Most of them don't. In my statement, I also included the data showing the number of attorneys that had been directly involved in rule 11 cases over a given span, and that number was 24 percent, and the number who at one time or another had had at least threats of rule 11 sanctions or some direct involvement enough to be noticeable is 82 percent of all of the attorneys.

Mr. HOKE. Doesn't that just suggest that there is probably a lot more abuse than one might suspect. Isn't the purpose of the rule to ferret that out and doesn't that mean that it is working? Isn't that at least one interpretation of those numbers?

Mr. FRANK. It is, respectfully, sir, a difficult interpretation because, if this were abuse and abuse were being controlled, you would not find the bar so overwhelmingly of a view on this subject because they would be getting the benefit of the abuse control and, as it is, you find every stratum, the defense bar, the plaintiffs' bar, troubled acutely here.

Mr. HOKE. I have to interrupt you on that. I am a member of the bar myself and I don't see that the bar can be an objective arbiter of that. I don't find that persuasive at all.

Mr. FRANK. If it were one side or another, you would think it would have a plaintiff's or defendant's edge. The litigation section of the ABA is the best cross-section of plaintiffs' bar and defense bar that we get. And similarly with the American College, it is not one way or another and here you get really essentially unanimous expression—

Mr. HOKE. Both the plaintiffs' bar and the defendants' bar, both groups are clearly subject to those sanctions. Regardless of whether you are doing defense work or plaintiffs' work, you are not particularly favorable or happy about the idea of having those kinds of sanctions brought against you.

Mr. FRANK. It is true that nobody is happy. But the—

Mr. HOKE. We are trying to change it.

Mr. FRANK. The rule is fundamentally based on the opinion of Justice O'Connor in the leading case, that the object of the rule should be deterrence, and it has been bent in that direction by its current manifestation. You raise several other points and I would like to respond and I am not sure that I hold all of them in my mind.

Mr. HOKE. That was part of the idea, so that I would be able to get to some of the other panelists with questions.

The point about the American Society that I can't pronounce—

Mr. FRANK. That is Judicature report. This is the matter that Representative Schroeder just asked me about. The fact is that the total number of sanction cases in the civil rights field is smaller

than the total number of sanction cases in the contracts field. That is what their study shows.

But if you look at those same figures, you will see that the number of civil rights cases is infinitely smaller than the number of contract or tort cases and proportionally the number is much higher. I published those proportional figures. I don't think that I included them in this statement, but they are there. I would be happy to send you supplemental information on that point.

Mr. MOORHEAD. Would the gentleman yield?

Along the same line, the Federal Judicial Center's rule 11 survey of Federal district judges showed that 80 percent of the Federal judges believed that the old rule 11 should have been retained and that 75 percent said that the benefits justify the expenditure of judicial time.

Mr. FRANK. As I said in my statement, I made two brief observations. It is a lot more fun to be a cat than a mouse, and it is true that judges who are levying penalties may enjoy it more than the parties who are receiving them.

But the critical point is that the leading body for the judicial system of America is the Judicial Conference of the United States, and with all this data before it, the Conference unanimously sent to you the present rule 11 and that is a pretty good indication of what the mature judgment of the judiciary is.

Ms. BALLEEN. May I make a comment in response to your questions earlier, the question about the bar? I guess it gets to the point, the cat versus the mouse. It doesn't surprise me that those who are subject to sanctions or potentially subject to sanctions, whether they are plaintiffs or defense bar participants, don't like the rule or at least some don't. I think we need to look through that to the question of how does this affect the litigant who is really paying the fees.

This also relates to compensation versus deterrence. I think if you look at the American Judicature Society study, they found a relatively small amount of sanctioning activity but a large amount of changes in lawyers, behaviors, getting to the deterrence function. But the compensation function, which is a piece of section 104 of the bill, is also important, particularly when you take a smaller litigant.

If they are served with some sort of a frivolous pleading or paper, there is a real cost to that person involved even in hiring a lawyer to question it. If there is an opportunity to withdraw it, when you look at a big business or an insurance defendant, it is a nuisance to us, it is an economic cost to us but it is not a budget buster. If you have a small business that is involved in something like this, just hiring a lawyer can really make or break the profit for that month or a longer period of time. So I think we would like you to think of those costs as well.

Mr. MOORHEAD. It is very difficult to find very many mice even though they are good mice that want more cats around.

Mr. HOKE. Mr. Chairman, on that note, I am going to withhold further questions because I want to hear the questions of my colleague from Virginia, who actually practiced in this area of the law for more than a decade.

Mr. MOORHEAD. Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman.

The biggest problem I have with rule 11 is it doesn't accomplish a lot and it is very subjective in nature. I will support the change from "may" to "shall" because I think it makes it a little less subjective, but the problem as I see it is we place a lot of judgment in the hands of the judge as we would like to do.

But essentially it says that if the judge finds that the plaintiff brought a cause of action and it was a close call, then no sanctions apply. But if in the mind of the judge it wasn't a close call, then sanctions should apply. If you are a plaintiff, they don't perceive it that way and that subjectivity provides a lot of dissension that probably leads to a lot of the secondary actions that Mr. Frank referred to.

Secondly, talking about cats and mice, I think one of the problems with it is that all of the cats in this case are former mice, and as a result, I think that there is a great reluctance on the part of many judges to apply the sanctions when they ought to be applied because they are in the position of having to make these subjective calls.

So I am interested in your comment on something less subjective such as an alternative dispute resolution mechanism with a loser-pays provision attached to it; for example, in diversity cases requiring that the matter go before an arbitrator, perhaps the U.S. magistrate. Up until that level in recognition of the fact, there may be poorer people that need to have access to the courts and might be concerned, there would be no risk of paying the opposing side an attorney's fee.

However, if you are not satisfied with the arbitration award and you wish to take it on to district court at that point if you do not improve your position, the plaintiff or the defendant, the defendant getting a reduced verdict after they decide to go on into court, if you don't improve your position, you would then be required to pay the additional cost, the additional attorneys' fees beyond that level of arbitration.

What do you think about that?

Ms. BALEN. Getting first to the question about subjectivity, clearly the bill before this committee is an effort to reduce the subjectivity. If we can think of any ways to further enhance the mandatory aspect of the rule limiting judicial discretion, we think we would be in favor of any further strengthening of it.

With respect to the type of proposal, these are the types of things that we have been looking at both as possible scenarios in the loser-pays situation and also as a complement to a strong rule 11. We are looking at language that would combine the use of an early neutral evaluator with some sort of a rule 68-type mechanism and would be happy to share that with you.

We favor the use of ADR as a way to reduce fees and to encourage settlements. We have been trying to come up with some language and are happy that there is a member of this committee that will be interested to hear about it.

Mr. GOODLATTE. I would be interested in that.

Mr. Frank, before I give you the opportunity to pounce on that, let me ask you your opinion of rule 68, offers and judgments. Is that a good rule?

Mr. FRANK. I think it has distinct points. For some reason, it was raised 10 years ago for broadening in general, lighter application. It raised an enormous national tumult, so much so that it very nearly came to repeal of the Rules Enabling Act.

Mr. GOODLATTE. What about the current applicability of it, though.

Mr. FRANK. It is weak as it stands.

Mr. GOODLATTE. Do you think the concept of a defendant being able to offer in judgment an amount, and if that amount is not exceeded in the trial, they are entitled to recover attorney fees; is that a good concept?

Mr. FRANK. I think that concept or the concept that came out in your colloquy of having a preliminary appraisal of the case setting a bench level of what the case is worth, helps. Under the Michigan system, if you got more than 10 percent over a level one side paid, and if you got more than 10 percent under it, the opposite side was chargeable. There are a number of these proposals.

Mr. GOODLATTE. So we might actually have something that the insurance companies and the trial lawyers might get together on?

Mr. FRANK. I must tell you that the rule 68 improvement provisions came up at the last meeting of the Civil Procedure Committee of which I am an emeritus member and at that time, it seemed too difficult to deal with. But if there came waves from this committee saying, give us a better 68, something of that kind could and—I have been pushing for something of the sort she just suggested, a stabilized value.

Permit me to go an inch further. May I make clear to all of you, this colloquy is what Mr. Olson was talking about before when he said that your present loser-pays doesn't make sense because you can't tell who is the loser. You haven't established a benchmark and because it is the custom as has been wisely said here by Mr. Foster of asking for preposterous damages, most of our cases turn out to be a question of how much is a fair price, what is a reasonable damage.

If you get over that reasonable damage level, then the plaintiff won, and if you get under it, then the defense won. That is how you know who is the winner and who is the loser. So your problem with the present loser-pay is that it creates no system of benchmark at all. It could be a rule 68-type mark by improving that, it could be an appraisal of the case by a panel, which has been done successfully in Michigan and elsewhere, but you have got to have some system built in there so you know who won and who lost.

Mr. GOODLATTE. I appreciate that. The problem I have with current rule 68 is that it seems grossly unfair for a defendant who is at fault to be able to place themselves in a better position than a defendant who has no fault at all, somebody in some of the situations described by Mr. Foster who may win the case in the end but have no ability to say to the plaintiff, I will offer to dismiss your case, it has no merit and you will suffer no consequences by doing that, and if you choose not to accept that offer and go on to court, there is no risk for doing that.

On the other hand, if there is a risk that a defendant who was at fault makes an offer and the plaintiff fails to exceed it, that defendant can recover attorneys' fees if you don't exceed it.

Mr. FRANK. I would say, right on. You could get the chairman to write to the Judicial Conference and say please take a look at 68 and see if it can be improved.

Mr. GOODLATTE. I would make that apply to the plaintiff as well. I would say that if the plaintiff made an offer of settlement, they ought to be able to recover if the defendant does not do less than that amount.

Mr. FRANK. I agree. Sixty-eight tends to be a one-way street. I hope—you are raising a terribly vital point. One way to move litigation would be to try and set some benchmark values at an early stage and that is what you are proposing.

Mr. GOODLATTE. Mr. Chairman, I thank you very much.

Mr. MOORHEAD. Thank you.

And I want to thank the witnesses here today. It has been a long time for you to sit here, I know, but your testimony is very helpful.

The subcommittee is now adjourned and will resume on Friday, February 10, 1995, in room 2237, Rayburn House Office Building at 9:30 a.m.

[Whereupon, at 2:15 p.m., the subcommittee adjourned, to reconvene at 9:30 a.m., Friday, February 10, 1995.]

ATTORNEY ACCOUNTABILITY

FRIDAY, FEBRUARY 10, 1995

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS AND
INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:33 a.m., in room 2237, Rayburn House Office Building, Hon. Carlos J. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives Carlos J. Moorhead, George W. Gekas, F. James Sensenbrenner, Jr., Martin R. Hoke, Howard Coble, Bob Goodlatte, Jerrold Nadler, and Patricia A. Schroeder.

Also present: Thomas E. Mooney, chief counsel; Joseph V. Wolfe, counsel; Mitch Glazier, assistant counsel; Sheila Wood, secretary; Veronica Eligan, secretary; and Betty Wheeler, minority counsel.

Mr. MOORHEAD. Will the subcommittee please come to order?

The Subcommittee on Courts and Intellectual Property is meeting this morning on the second hearing of legislation on legal reform. I want to welcome you to the subcommittee's second day of the hearings.

On Monday, the subcommittee heard testimony on several problems that affect our civil justice system and two proposals in H.R. 10 that are designed to begin the process of addressing some of these problems. Specifically, we received testimony on section 101 of H.R. 10, which would require a losing party in a lawsuit to pay the prevailing party's attorney's fees in diversity cases commenced in, but not removed to, Federal court. We also received testimony on section 104, which would amend rule 11 of the Federal Rules of Civil Procedure to restore the mandatory requirement for courts to sanction attorneys for improper actions and frivolous arguments intended to harass, unnecessarily delay, and needlessly increase the costs of litigation.

Today we'll receive testimony from one of our distinguished colleagues and two distinguished panels of witnesses on two additional proposals embodied in H.R. 10.

Our first panel will address the amendment to rule 702 of the Federal Rules of Evidence which would limit the standard for admissibility of scientific expert testimony.

Our second panel will be devoted to consideration of the prior notice provisions found in section 105 of H.R. 10, which is designed to facilitate pretrial settlement.

Does the gentlelady from Colorado have an opening statement?
Mrs. SCHROEDER. Thank you, Mr. Chairman.

And, first of all, I want to congratulate you for what I thought was a useful hearing earlier this week on Monday, and I also particularly want to thank your staff, Tom Mooney, Joe Wolfe, and Sheila Wood, who have really extended every courtesy, and you have been the model of fairness.

Let me say I'm also very frustrated this morning, as I'm sure other members of the subcommittee are. It's not your fault, but the fact is that both subcommittees that I'm a member of are meeting, and, furthermore, the full committee is on the floor doing the crime bill. This is the worst kind of nightmare, but, as I say, it's not your fault. I just think that this is an outrageous way to have to try to be in three places at the same time, and, obviously, it's impossible.

But, as a preliminary matter, I would like to ask unanimous consent, Mr. Chairman, to place in the record of this hearing the written testimony of Arthur Burris, who is the president of a Virginia asbestos group, with respect to loser-pays provisions of H.R. 10.

Mr. MOORHEAD. That will be so ordered.

[The prepared statement of Mr. Burris follows:]

PREPARED STATEMENT OF ARTHUR C. BURRIS

My name is Arthur Burris. After graduating from high school in 1951, I started working at the Newport News Shipbuilding and Dry Dock Company as an apprentice in the Pipe covering Department. Over the next 20 years, I worked my way up to being Department Superintendent. Along with thousands of other shipyard workers, I used asbestos products throughout that period of time. In 1980, I developed shortness of breath and was diagnosed to have asbestosis of the lungs. On November 13, 1981, I learned that I also had cancer of the digestive tract, and my doctors advised me that this cancer was also related to my occupational exposure to asbestos. As a consequence of that disease, I had to have a permanent colostomy, and every day when I have a bowel movement I am reminded of the damage that asbestos had done to the normal function of my body.

As a result of the combination of my asbestosis and cancer, I was forced to retire on permanent disability at age 52. In 1981, I hired attorneys Robert R. Hatten and Richard S. Glasser to sue approximately 12 different asbestos manufacturers because they had failed to warn me of the dangers of asbestos, dangers that had been known by them since the 1930s, but dangers that were not communicated to me or the other shipyard workers with whom I worked until the 1970s. Had I known about the dangers of working with asbestos products, I would never have used those products or spent my working life breathing the dust from those products in the engine rooms and boiler rooms of the ships on which I worked. In 1985, on the eve of trial, after my case had been pending for approximately four years, a satisfactory settlement was reached with the asbestos manufacturers for approximately \$400,000. My contract with Mr. Hatten and Mr. Glasser provided for a contingency fee of 30%, and in consideration of the complexity of the case, the work performed and the benefit to me and my family, it was my opinion that their fee was well deserved.

Mr. Hatten and Mr. Glasser were both very young in 1976 when they filed their first claim against the asbestos manufacturers. Mr. Hatten's office was in Newport News, and Mr. Glasser's law firm was in Norfolk. They concluded that it would be impossible for either one of them alone to take on the asbestos industry because no single law firm could afford that risk or expense. In fact, no one else in Tidewater or anywhere else in Virginia would take these claims, and throughout the 1970s and into the 1980s, Mr. Hatten's and Mr. Glasser's law offices were overwhelmed by the large number of defense attorneys hired by the asbestos manufacturers. In both Newport News and Norfolk, Mr. Hatten and Mr. Glasser were laughed at because no one believed that they could succeed in their claims. The doomsayers were almost right because for the first eight years that Mr. Hatten and Mr. Glasser represented asbestos victims in Newport News and Norfolk, they were only able to bring three cases to trial. One resulted in a verdict for the Plaintiff that was forced to settle on appeal; the other two resulted in verdicts for the Plaintiff that were both reversed on appeal. Nevertheless, Mr. Hatten and Mr. Glasser continued to fight for the rights of asbestos victims, and hundreds of those victims were dying in our com-

munity. Finally, in the mid-1980s, the tide turned and Mr. Hatten and Mr. Glasser began to win settlements and trials for asbestos victims.

These settlements did not come quickly or easily. The asbestos manufacturers and their insurers required Mr. Hatten's and Mr. Glasser's offices to prepare as many as thirty (30) cases for trial every month for approximately five years. All of these cases had been filed in the Federal Court in Norfolk, Virginia under the diversity jurisdiction of the Court, but no case could settle until a firm trial date had been established and full discovery completed. Although a number of these cases went all the way to verdict each year, most of them were settled either on the courthouse steps or in the middle of trial after the attorneys had spent hundreds of hours of pretrial preparation. Today, Mr. Hatten and Mr. Glasser continue to prosecute hundreds of claims for asbestos victims in Virginia because, unfortunately, there continues to be an epidemic of asbestos disease and death in the shipyard communities of Norfolk and Newport News, Virginia.

In 1985, the asbestos victims themselves decided to try to help their lawyers by forming the Virginia Asbestos Victims, Inc., a non-profit corporation composed of more than 1,500 asbestos victims and their widows. I presently serve as Chairman of the Board of the Virginia Asbestos Victims, Inc. Our group lobbied to help to change the harsh Virginia statute of limitations so that the claims of asbestos victims could be heard on their merits and not be barred by an unintended legal technicality. Our group also successfully fought caps on pain and suffering in the Virginia General Assembly, and we persuaded the Virginia lawmakers to establish new procedural laws to avoid the expense of repetitive and costly litigation through consolidated trials. Our organization has also established support groups for the widows of mesothelioma victims and a library to assist those who are dealing with the pain and suffering of death from asbestos-related disease.

As a result of recent class actions and consolidations, most asbestos victims today are compensated, but throughout the previous 20 years, this litigation has been expensive, contentious, and exhausting to all concerned. I, myself, was subpoenaed for dozens of depositions and listed as a potential witness in hundreds of trials. In Virginia alone, the litigation produced literally thousands of depositions, thousands of documents, hundreds of witnesses, and literally hundreds of hearings and trials. During all of this time, the primary tactic of the defense attorneys was to delay and bottleneck the claims; consequently, none of these claims were paid in the absence of substantial work by the trial lawyers.

When I finally settled my case in 1985—four years after it was initially filed—I did so because I wanted to avoid the risk of losing, and I wanted to avoid the risk of paying more than \$30,000 of expenses that would be required for expert testimony at trial. If I had known at the time that I filed my lawsuit, a time when I was disabled, out of work, and out of money, that I would risk paying the attorneys' fees and costs of the 12 asbestos manufacturers who had caused my injuries, I would never have filed my lawsuit. In this sense, I am exactly like all of the asbestos victims in Virginia. None of these working men and women could have afforded the risk of paying for the attorneys' fees and/or costs of the asbestos manufacturers who caused their illness. The only way that this litigation could ever have been successful was through the contingency fee system, where the lawyers invested years of their time and accepted essentially all of the risk of this litigation.

In the 10 years that I have been the Chairman of the Board of the Virginia Asbestos Victims, Inc., I have never had a single client of Mr. Hatten or Mr. Glasser complain to me that their fees were too high, and I have never had a single asbestos victim in Virginia complain to me that the attorneys did not justly earn their fees. Instead of complaints about the attorneys' fees, the uniform statements that are made to me by the asbestos victims in Virginia are how thankful they are that lawyers like Mr. Hatten and Mr. Glasser have helped their families.

As you consider the English rule, consider this: In Newport News, Virginia alone, there are 400 families of asbestos victims who have died of mesothelioma and lung cancer who have received hundreds of thousands of dollars as a consequence of the efforts of lawyers who accepted the risk of this difficult litigation. It is a fact that none of these families would have been compensated for their pain and suffering if the English rule had existed because—even if Mr. Hatten and Mr. Glasser had been willing to accept the risk of this litigation—none of their clients would have accepted the risk of having to pay the cost of the attorneys who represented more than a dozen Fortune 500 companies and their many billion-dollar insurance companies.

In our community, more than 2,000 families have benefited from the work of the attorneys who prosecuted this risky and difficult litigation. Money that has been obtained for these asbestos victims has allowed them to live their lives in dignity. This money has prevented the Newport News Shipyard from being required to pay mil-

lions of dollars in workmen's compensation benefits to the asbestos victims, and this money has been placed into the local economy, where it has benefited the community which would otherwise have lost the benefit of the earnings of the able-bodied men and women who lost their livelihood and their lives to asbestos. The attorneys' fee did not add to the value of the claims, it did not increase the liability of the asbestos manufacturers, and it was willingly paid by the asbestos victims.

The contingency fee system gave me and all of the other asbestos victims who are represented by Mr. Hatten and Mr. Glasser access to justice. Under the English rule, that justice would have been denied for all of us.

Mrs. SCHROEDER. Secondly, today we take up two issues from H.R. 10, a proposed amendment to rule 702 of the Federal Rules of Evidence relating to testimony by experts, and a proposal requiring notice before the commencement of a civil action. I believe it's premature and ill-advised for the committee to consider rule 702 at this time.

Several days ago, you and I both received a letter from the Honorable Ralph K. Winter, who is a judge from the U.S. Court of Appeals, in his capacity as the Chair of the Advisory Committee on Evidence Rules of the Judicial Conference. As you know, he was appointed to that position by Judge Rehnquist, and I understand you will be placing that letter in the record.

Mr. MOORHEAD. That is correct.

Mrs. SCHROEDER. So then I will not make that motion.

But he reports that the advisory committee unanimously concluded that the amendment of rule 702 would be counterproductive in light of the recent Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals*. The judge said it is too early to determine whether the *Daubert* decision curbs abuses in the use of expert testimony. The decision in *Daubert* addresses problems with respect to expert testimony, and they feel unanimously it's premature for us to meddle in the matter. They go on to say it's inappropriate for us to meddle in a way that circumvents the Rules Enabling Act rulemaking process.

Judge Winter notes that the, "Revision of evidentiary rules governing admission of expert testimony in civil and criminal cases involves particularly complex issues that are tremendously dependent upon each case, and under the Rules Enabling Act, every proposed amendment is subject to public comment, widespread examination by people who work daily with the rules, and meticulous care in drafting. The proposed amendment of the Evidence Rule 702 is precisely the type of work best handled by the act's rulemaking process."

Judge Winter spells out in some detail what several of our witnesses today will also say: the proposal before us does not codify *Daubert*, as has been asserted. Instead, as the Judge says, it makes distinctions expressly rejected by the Supreme Court in *Daubert*. It injects uncertainties and burdens that would become very significant problems, particularly for prosecutors who rely on scientific evidence in establishing the guilt of defendants. It reverses the present balancing test, contrary to *Daubert's* express terms. Judge Winter tells us that this provision, if enacted, would cause great mischief.

Mr. Chairman, we should heed these cautionary warnings of people who are in the field and have to deal with this every day, and I hope we could withdraw the proposed amendments to rule 702

and allow the Rules Enabling Act rulemaking process to give the proposal the thorough consideration it deserves and proceed in the way that we normally have dealt with this. In my view, it doesn't speak well of us to blithely ignore a bill that purports to codify, but, in fact, radically changes the decisions of the Supreme Court.

With respect to the prior notice provisions, I urge similar caution. In the name of reform, we often in this body do something rash. Reform often equals rashness, and I think in this area it would be very inadvertent and I would certainly hope we would not do that.

I would ask unanimous consent to put the rest of my statement in the record.

[The prepared statement of Mrs. Schroeder follows:]

PREPARED STATEMENT OF HON. PATRICIA SCHROEDER, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF COLORADO

Thank you, Mr. Chairman. I first want to take a moment to congratulate you for what I thought was a very useful and illuminating hearing this past Monday. I also want to thank you and your staff members, Tom Mooney, Joe Wolfe, and Sheila Wood, who have extended every courtesy and cooperation to the minority as we have prepared for the subcommittee's hearings this week.

As a preliminary matter, I would ask unanimous consent, Mr. Chairman, to place into the record of this hearing the written testimony of Arthur Burris, president of a Virginia asbestos victims' group, with respect to the "loser pays" provisions of H.R. 10. He has an important perspective to add, and I want to be sure his testimony about how H.R. 10 would raise a very substantial barrier to the courthouse for victims with compelling claims is included in our record.

Today, we take up two issues from H.R. 10: a proposed amendment to Rule 702 of the Federal Rules of Evidence, relating to testimony by experts, and a proposal requiring notice before commencement of civil actions.

I believe it is premature and ill-advised for this subcommittee to consider the Rule 702 proposal at this time. Several days ago, I received a letter from The Honorable Ralph K. Winter, Judge, United States Court of Appeals, in his capacity as Chair of the Advisory Committee on Evidence Rules of the Judicial Conference of the United States. This is a position to which he was appointed by Chief Justice Rehnquist. I know that you also received this letter, and understand that you are placing it in the record of today's hearing.

Judge Winter reports that the Judicial Conference Advisory Committee on Evidence Rules unanimously concluded that amendment of Rule 702 would be counterproductive at this time in light of the recent decision of the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993). Judge Winter writes that it is "yet too early to determine whether *Daubert* curbs abuses in the use of expert testimony." Mr. Chairman, the Supreme Court very carefully crafted a decision in *Daubert* designed to address problems with respect to expert testimony, and it is entirely premature for us to meddle in this matter before the effectiveness of *Daubert* can be assessed by the Judicial Conference and by federal judges themselves.

It is particularly inappropriate for us to meddle in a way that circumvents the Rules Enabling Act rulemaking process. As Judge Winter notes in his letter:

Revision of evidence rules governing the admission of expert testimony in civil and criminal cases involves particularly complex issues that vary tremendously depending on the case. Under the Rules Enabling Act rulemaking process, every proposed amendment is subject to public comment and widespread examination by individuals who work daily with the rules and meticulous care in drafting by acknowledged experts in the area. Proposed amendment of Evidence Rule 702 is precisely the type of work best handled by the Act's rulemaking process.

Finally, Judge Winter spells out in some detail what several of our witnesses today also say in their testimony: The proposal before us, Sec. 102 of H.R. 10, does not codify *Daubert*, as some have asserted. Instead, it makes distinctions expressly rejected by the Supreme Court in *Daubert*. It injects uncertainties and burdens that could cause significant problems particularly for prosecutors who often rely on scientific evidence in establishing the guilt of defendants. It reverses the present bal-

ancing test, contrary to *Daubert's* express terms. Judge Winter tells us that if this provision "if enacted would cause mischief."

Mr. Chairman, we should heed these cautionary warnings, and withdraw the proposed amendments to Rule 702 and allow the Rules Enabling Act rulemaking process to give this proposal the thorough consideration it deserves. These procedures, after all, are prescribed by Congress.

In my view, it does not speak well of us that we blithely ignore the procedures we enacted in order to rush through a bill that purports to codify, but in fact radically changes, a decision of the United States Supreme Court.

With respect to the prior notice provisions, I urge similar caution to ensure that in the name of "reform," we do not impose upon the court system a provision that inadvertently creates more expense, delay, and litigation.

I join you, Mr. Chairman, in welcoming our witnesses today, and I look forward to an opportunity to explore with them the full scope of the concerns I have outlined.

Mr. SENSENBRENNER. Mr. Chairman.

Mr. MOORHEAD. Yes?

Mr. SENSENBRENNER. Mr. Chairman, it appears that we might be adjourning very suddenly today. And if that's the case, I would like to ask unanimous consent that all of the witnesses' full written testimony be included into the record. So if we suddenly have to disappear, there will be a record as to what the witnesses would have to say.

Mr. MOORHEAD. They will be, but if we have to, we're going to have kind of an informal meeting here to get the ideas of the witnesses while they—

Mr. SENSENBRENNER. I would ask unanimous consent that it be put into the record.

Mr. MOORHEAD. Without objection, and at the same time, I would ask unanimous consent that the letter from Judge Ralph Winter and the letter from Judge William Schwarzer be put in the record also.

[The letters follows:]

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

February 7, 1995

Honorable Carlos J. Moorhead
Chairman, Subcommittee on Courts
and Intellectual Property
Committee on the Judiciary
United States House of Representatives
B351A, Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

I write to request your assistance to prevent amendment of Rule 702 of the Federal Rules of Evidence (Testimony by Experts) outside the Rules Enabling Act process in your consideration of H.R. 10, the *Common Sense Legal Reform Act*.

The Chief Justice established and appointed members to the Judicial Conference Advisory Committee on Evidence Rules in early 1993. As part of a comprehensive review of all the evidence rules, the committee discussed at length the rules on expert testimony at separate public meetings on May 9-10, 1994, and October 17-18, 1994.

The committee unanimously concluded that amendment of Rule 702 would be counterproductive at this time in light of the recent decision of the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993). It is yet too early to determine whether *Daubert* curbs abuses in the use of expert testimony. A valid assessment of its effects can only be made after courts acquire more experience with it. The committee will continue to study the operation and effect of the rule as construed under *Daubert* by the courts.

At its January 9-10, 1995 meeting, the committee discussed the proposed amendment of Evidence Rule 702 contained in H.R. 10. Section 102 of the bill would add a new subdivision (b) to Rule 702 purportedly codifying the *Daubert* decision. *Daubert* is now the law of the land. Restating the Court's opinion, even if drafted accurately, is unnecessary. But Rule 702(b) as proposed in H.R. 10 does not accurately codify *Daubert*. And if enacted would cause mischief.

CHAIRS OF ADVISORY COMMITTEES

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Honorable Carlos J. Moorhead
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Rule 702(b) distinguishes between "validity" and "reliability" of scientific evidence, a distinction expressly rejected in *Daubert*. Under the proposed amendment, a judge must determine the "validity" of scientific evidence as a preliminary matter. This new requirement imposes an ill-defined burden on the courts. Indeed, it is difficult to see how scientific evidence can be "reliable" and yet not be "valid." The uncertainties created by the requirements could cause significant problems, particularly for prosecutors who often rely heavily on "scientific evidence" in establishing the guilt of defendants.

Rule 702(b) limits its scope to "scientific knowledge." It does not extend to "technical or other specialized knowledge," items explicitly contained in Rule 702. By implication, the proposed amendment would bar extension of *Daubert* to these other types of evidence - something *Daubert* leaves open.

The proposed Rule 702(b) would also reverse the present Evidence Rule 403 balancing test, which *Daubert* expressly applies to Rule 702 testimony. Rule 702(b) would require that the proffered opinion be "sufficiently reliable so that the probative value of such evidence outweighs the dangers specified in Rule 403"; instead of the existing test which permits the exclusion of evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."

The reverse balancing test used in Rule 702(b) raises serious problems, because it applies only to "scientific knowledge." The Rule 403 balancing test would continue to apply to opinion testimony that is "technical or other specialized knowledge." There is no apparent reason to apply different balancing tests to different types of opinions. The distinctions will generate unnecessary and wasteful litigation as resourceful lawyers attempt to discern differences in individual cases.

Section 102 would also add a new Evidence Rule 702(c), which excludes testimony from an expert who is entitled to receive "compensation contingent on the legal disposition of any claim with respect to which such testimony is offered." The need for the provision is unclear. Contingent fee expert testimony is prohibited in most districts under disciplinary rules regulating professional conduct.

Unlike disciplinary rules, the proposed Rule 702(c) would regulate and penalize contingent fee expert testimony by excluding the proffered evidence. Neither the provision's advantages nor adverse effects are fully understood. Moreover, the relationship between the new rule and the numerous statutory fee-shifting provisions is unclear. Expert testimony given in *pro bono* cases where payment of fees for experts is shifted to the losing party may be subject inadvertently to exclusion under Rule 702(c).

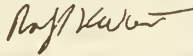
Honorable Carlos J. Moorhead
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Although less likely, disputes may arise concerning large corporations' in-house experts whose livelihoods depend on their past records in testifying before the courts or experts testifying in cases litigated on a contingency attorney-fee basis. The entire question of what "entitled to receive compensation" means in Rule 702(c) is a matter that needs careful attention and study.

Revision of evidence rules governing the admission of expert testimony in civil and criminal cases involves particularly complex issues that vary tremendously depending on the case. Under the Rules Enabling Act rulemaking process, every proposed amendment is subject to public comment and widespread examination by individuals who work daily with the rules and meticulous care in drafting by acknowledged experts in the area. Proposed amendment of Evidence Rule 702 is precisely the type of work best handled by the Act's rulemaking process.

The committee urges you to withdraw the proposed amendments to Evidence Rule 702 in section 102 from H.R. 10.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Ralph K. Winter", with a stylized flourish at the end.

Ralph K. Winter
Judge, United States Court
of Appeals

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February 9, 1995

Tom Mooney, Esq.
Counsel
Subcommittee on Courts and Intellectual Property
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Mooney:

The Federal Judicial Center has recently received a number of inquiries about our research on the problems of expert testimony in federal courts and programs the Center has undertaken to help judges deal with these problems. Since it is likely that these studies and programs will be mentioned in congressional testimony concerning H.R. 10, The Common Sense Legal Reform Act of 1995, we provide this written summary of our activities in this area for the information of the Subcommittee.

Prior to the decision by the Supreme Court in *Daubert v. Merrill Dow Pharmaceuticals Inc.*, the Federal Judicial Center surveyed federal district judges to determine the characteristics of expert testimony in recent civil trials and judges' perceptions of problems with expert testimony. On November 25, 1991, a questionnaire was sent to 518 active federal district judges, asking them to report on their most recent civil trial that included expert testimony. Sixty-four percent of the judges returned completed questionnaires. These findings were presented to the rules committees of the Judicial Conference of the United States in 1992 and are being prepared for publication by the Center.

Scientific testimony comprised a relatively small portion of expert testimony. As indicated in Table 1, the survey determined that scientists comprised approximately ten percent of the experts offering testimony. The focus of the study was on the role of expert testimony in general, and did not determine the extent to which the problems identified are especially prevalent in testimony by scientific experts.

Problems of Expert Testimony in Civil Trials.

As part o. the survey judges were presented with a list of problems that are often attributed to expert testimony (not limited to scientific testimony) and asked to indicate, on a 5-point scale, the frequency with which each occurs in civil cases involving expert testimony. Table 2 presents the list of problems ranked according to the mean frequency ratings assigned to them by respondents. Please note that the responses do not address the extent to which the problems have been diminished by the Supreme Court's decision in *Daubert* and by the

education programs which the Federal Judicial Center has undertaken to aid judges in dealing with expert testimony.

The most frequently identified problem was "Experts abandon objectivity and become advocates for the side that hired them." A number of judges chose to elaborate on this concern in responding to the open-ended questions. One judge noted, "The biggest problem is . . . that both sides can hire well-qualified experts who will say whatever is needed and thereby become advocates." Another judge criticized the "willingness of academics to sell their credentials to the highest bidder—or at least for a high bid—and testify in support of questionable propositions." A third judge mentioned the use of "'professional witness expert[s]' who will give any opinion the lawyer wants, especially in product liability cases."

The second most frequently noted problem was the "Excessive expense of party-hired experts." In comments, some judges merely noted that the cost of retaining experts appears to be exorbitant. One judge focused on pretrial problems, mentioning the "refusal of experts to write a report or to give a deposition without being paid a substantial fee." Other judges noted that experts often offer redundant testimony, thereby increasing both the expense and duration of trials.

The third and fourth most frequent problems—"Conflict among experts that defies reasoned assessment" and "Expert testimony appears to be of questionable validity or reliability"—relate to difficulty in making an informed assessment of expert testimony. Several judges reported that expert testimony is often in direct opposition, making it difficult to assess the basis of the disagreement. These judges usually noted the obligation of the attorney to make the evidence comprehensible. Other judges focused on testimony that goes beyond the foundation that has been prepared. Several judges objected to experts basing their testimony on facts or assumptions that are inconsistent with the case, and suggested that some attorneys rely on experts to introduce testimony that is otherwise inadmissible.

Judicial Education Programs Concerning Expert Testimony.

The Federal Judicial Center has developed a series of programs to enhance the ability of federal district judges to consider complex scientific issues arising in litigation.

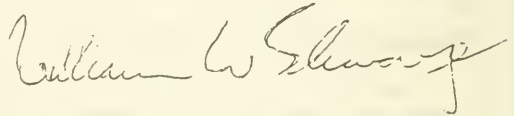
In December the Federal Judicial Center published its *Reference Manual on Scientific Evidence* (enclosed). The *Reference Manual* aids judges in the application of the rules of evidence governing expert evidence and in the management of such evidence. It contains seven reference guides that outline the issues that commonly arise when expert evidence is offered in the fields of epidemiology, toxicology, survey research, DNA identification, statistical inference, multiple regression, or economic loss. These outlines offer a framework of questions to assist in issue identification. Parties in particular cases may be invited to supplement the reference guides with information that will be helpful in the case. The manual also offers guidance for the use of court-appointed experts and special masters in extraordinary cases. The Center is providing copies of the manual to all federal judges. Eight private publishers have elected to reprint the *Reference Manual* and make it available to the bar and the public.

The Center has developed a series of judicial education seminars to aid judges in dealing with complex scientific evidence. Two seminars held this past December and January introduced the *Reference Manual* to approximately 150 federal judges. They also identified the needs of judges for certain types of information, and helped refine educational materials that can be used in the upcoming training program. At upcoming workshops later this year district judges who did not attend one of the two previous programs will also receive a videotaped introduction to the manual. Sessions also will be offered on the differences between scientific and legal thinking, the standards for admissibility of scientific evidence after *Daubert*, and on specific types of scientific and technical evidence. We hope to add additional topics to the curriculum previously offered at the two introductory programs, as suggested by comments we received from judges attending these programs. Such topics may include sessions on survey research and computer-generated evidence. We expect this one-day program to reach approximately 650 federal district judges. In addition, a special panel on appellate review of decisions involving scientific evidence will be presented at the workshop for all federal appellate court judges in June.

As part of the survey mentioned above approximately two-thirds of the judges indicated that they would find it useful if professional and scientific societies would provide lists of members who were willing to serve as court-appointed experts, but not as party-retained experts. We are exploring this possibility by assisting the National Conference of Lawyers and Scientists in preparing a demonstration project that is intended to link judge's requests for assistance in identifying candidates to serve as court-appointed experts with scientists and engineers nominated by professional societies.

If you require additional information about these programs, please contact me or Joe Cecil in the Research Division of the Center.

Sincerely,

A handwritten signature in dark ink, appearing to read "William W. Wheeler". The signature is fluid and cursive, with the first name "William" and last name "Wheeler" clearly distinguishable.

c: Betty Wheeler, Minority Counsel

Table 1: Expertise of Witnesses offering Expert Testimony in 326 Recent Federal Civil Trials.

<u>Category label</u>	<u>Count</u>	<u>Pct of experts</u>	<u>Pct of trials with 1 or more experts</u>
MEDICAL/MENTAL HEALTH	627	39.2	52.1
ENGINEERING/PROCESS/SAFETY	445	27.8	47.9
BUSINESS/LAW/FINANCIAL	377	23.6	52.4
Economist	125	7.8	30.5
SCIENTIFIC SPECIALTIES	150	9.4	18.6
Agricultural Scientist	5	.3	.9
Chemist	18	1.1	3.0
Computer Scientist	9	.6	.9
Epidemiologist	8	.5	1.5
Geologist	10	.6	1.2
Metallurgist	13	.8	2.4
Meteorologist	5	.3	.9
Molecular Biologist-Genetics	5	.3	.9
Physicist	4	.3	1.2
Statistician	12	.8	2.1
Social-Behavioral Scientist	16	1.0	2.4
Toxicologist	9	.6	1.8
Other Science Experts	36	2.3	4.3

Table 2: Frequency of Problems with Expert Testimony in Civil Trials.

Note: The number in parentheses is the mean rating on a scale of 1 ("Very Infrequent") to 5 ("Very Frequent") of the frequency with which the judges observed this problem in civil cases involving expert testimony. Thus, the 3.98 at problem 1 indicates that judges observed this to be a "frequent" problem in civil trials.

1. Experts abandon objectivity and become advocates for the side that hired them. (3.98)
2. Excessive expense of party-hired experts. (3.48)
3. Conflict among experts that defies reasoned assessment. (3.08)
4. Expert testimony appears to be of questionable validity or reliability. (3.01)
5. Disparity in level of competence of opposing experts. (2.74)
6. Attorney(s) unable adequately to cross-examine expert(s). (2.72)
7. Failure of party(ies) to provide discoverable information concerning retained experts. (2.60)
8. Expert testimony comprehensible but does not assist the trier of fact. (2.50)
9. Expert testimony not comprehensible to the trier of fact. (2.42)
10. Delays in trial schedule caused by unavailability of expert(s). (2.29)
11. Indigent party unable to retain expert to testify. (2.13)
12. Expert(s) poorly prepared to testify. (2.05)

Mr. MOORHEAD. We have this morning the Honorable Toby Roth here with us. I'd like to welcome our distinguished colleague to the subcommittee. The Honorable Toby Roth is from the Eighth District of Wisconsin. Congressman Roth is the senior member of the House International Relations Committee and the House Banking and Financial Services Committee. He's also chairman of the House International Relations Subcommittee on Economic Policy and Trade, and we look forward to his testimony.

We have your statement. I ask unanimous consent that it be made apart of the record and ask you briefly to summarize your statement. In the interest of your time and that of the subcommittee, it's the Chair's intention that when we complete your testimony, we go directly to the panel of witnesses.

**STATEMENT OF HON. TOBY ROTH, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF WISCONSIN**

Mr. ROTH. Thank you, Mr. Chairman.

Did you want me to proceed before we go for a vote?

Mr. MOORHEAD. Yes.

Mr. ROTH. Mr. Chairman, let me be as brief as I can. I want to thank the committee, and may it please the committee and I want to thank the committee for allowing me to appear here because I know you are doing yeoman's work in this Contract With America.

For a number of years, I have been dedicated to reviewing and revisiting our product liability laws, and as chairman of the Economic Policy and Trade Subcommittee, I can tell you that our law dealing with product liability is costing us enormously, and also is a real impediment to our new products coming online and making us uncompetitive with overseas manufacturers. So I've been delighted that the Contract With America took almost word for word the bill I introduced and have introduced in prior Congresses.

But, Mr. Chairman and members of the committee, one of the key provisions has not been adopted, and that is the alternative dispute resolution provision. That basically says that it allows the parties to a dispute to settle product liability cases outside of the court system, and it would do this through arbitration or other alternative dispute resolution procedures recognized in the State in which the claim is made. It would speed up resolutions of cases and it would save a lot of legal costs. I ask the committee to review that and ask that this particular portion—I'm going to ask Mr. Don Sutherland, who has done a lot of work on this, to give you a copy of just how we would add this provision to the bill. I think it's a key element that is missing.

With that abbreviated statement, Mr. Chairman, I'm open to questions you may have.

[The prepared statement of Mr. Roth follows:]

**PREPARED STATEMENT OF HON. TOBY ROTH, A REPRESENTATIVE IN CONGRESS FROM
THE STATE OF WISCONSIN**

Mr. Chairman and members of the Subcommittee on Courts and Intellectual Property:

I appreciate this opportunity to testify in support of H.R. 10, the "Common Sense Legal Reforms Act of 1995."

Each of us has heard one or more horror stories concerning legal awards. For example, a New York Court awarded \$4.3 million to a mugger injured attempting to escape from the scene of a vicious crime; another court gave \$9.3 million to man,

who due to his own negligence, fell drunk onto the tracks of the New York City subway, and; an Alabama jury assessed \$65 million in punitive damages. While noteworthy, these awards alone do not fully justify the urgent need for fundamental legal reform.

Instead, the real need for reform lies with a tort system that is burying federal and state civil courts under more than 15 million new lawsuits each year. This system is exacting an enormous and growing burden on American individuals, families, and businesses.

In the marketplace, supply and demand impose their own system of checks and balances. When it comes to tort law and civil punitive damages, there are no checks and balances.

As a consequence, our nation's annual tort bill now amounts to approximately \$100 billion in direct costs, a more than 100% increase since 1985. That's more money than the combined profits of America's 200 largest corporations! Once litigation's indirect costs, for example, higher consumer prices, higher insurance rates, and higher medical charges, are taken into consideration, that figure approaches \$300 billion. Put simply, the nation's yearly tort bill comes to more than \$1,000 for every American family, and perhaps considerably more.

The rising costs of litigation are draining the productive sectors of our economy of funds better used for saving and investing. Saving and investment are vital to sustained American competitiveness. Excessive litigation means higher consumer prices, fewer jobs, and lower living standards.

It's no wonder many foreign nations all but bar tort litigation, as well as most other forms of civil litigation. Japanese law prohibits contingency fees, denies plaintiffs access to an opponent's evidence before trial, and requires plaintiffs to pay their lawyers an up-front fee of up to 8% of damages sought. Great Britain requires that the losers in lawsuits pay the winners' full legal costs.

While the financial costs of the present civil justice system are truly extraordinary, a far more serious situation seems to be emerging. Repeated public opinion surveys indicate a mounting lack of public confidence in the civil justice system. Confidence in the rule of law is at the heart of any democratic society. Without it, there can be no democratic society.

Many of my own constituents from Northeast Wisconsin are demanding that Congress reform our legal system. In my annual survey, one wrote, "You might . . . want to give product liability reform another try this year." Another advised, "The legal system reform should . . . incorporate a little more common sense." Finally, one exasperated family complained, "We both feel strongly against the high cost of lawsuits. In the end, everyone pays."

You pay. I pay. Everybody pays. We pay too much!

Clearly, fundamental reform of our federal civil justice system and product liability laws is essential if we are to maximize both opportunity and living standards for ourselves and for our children.

That's why, for more than a decade, I have been fighting to reform our product liability laws. Although none of that legislation has become law, I am proud to have helped start the drive for legal reform.

The "Common Sense Legal Reforms Act of 1995" will establish badly needed guidelines for determining punitive damages. It will set clear standards for product liability, and it will help deter frivolous claims.

The "Common Sense Legal Reforms Act of 1995" will better protect the interests of every consumer by providing clear, concise product liability guidelines and rational means for calculating punitive damages. It will also lead to lower consumer prices as manufacturers' liability costs are reduced.

Under the new system, individuals' rights to legal recourse will remain as strong as ever. There are no restrictions to prevent people from filing litigation.

Requiring the loser to bear some of the winner's legal costs will bring added accountability to the civil justice system, while the new basis for determining punitive awards will ensure that, for the first time, punishment is dispensed in relation to harm caused.

These reforms are plain common sense.

Today, nearly half of all companies discontinuing existing product lines do so because they fear excessive liability for maintaining those product lines. The fear of litigation is responsible in the cases of 39% of the companies who decide not to introduce new products. Finally, 25% of all companies canceling research projects, do so to avoid possible future liability.

For a moment, imagine an America in which innovation is brought to a standstill. While we would be frozen in time, our foreign competitors would continue to forge relentlessly ahead. The American Dream would die. Our children and grandchildren

would have less and less to look forward to. This is what's facing us if we don't fix our tort system.

It's time we listen to all the leading American corporate executives who have been warning us for years that our legal system is putting American companies at growing disadvantages relative to their foreign rivals.

If America is to continue to be the most prosperous nation in the world, Americans must be able to pursue opportunity to its ultimate conclusions. The "Common Sense Legal Reform Act of 1995" is an important step in that direction.

Mr. Chairman, I commend you and this subcommittee for the enormous task you are undertaking. I am confident that you will succeed, and that we all will benefit from your efforts.

I thank the subcommittee for its time and consideration.

Mr. MOORHEAD. Mrs. Schroeder, do you have any questions?

Mrs. SCHROEDER. I don't. I thank the gentleman for coming forward, and I know this is a crazy way to do this.

Mr. MOORHEAD. Well, we do have a problem here this morning with a bill on the floor, as you know, that comes out of our committee and we could be stopped almost at any time. For that reason, we decided to go forward as far as we can because the bill—we don't have any other time for the hearing on this. The bill will be coming up, the hearing on the balance of the bill, on Monday, and then there will be a markup probably sometime later next week.

Do you want to give us some kind of detail about this change that you would like to see?

Mr. ROTH. Yes, I'd be happy to, please.

Mr. Sullivan, would you give a copy of that?

It's all been drafted, Mr. Speaker—

Mr. MOORHEAD. I have a copy of it. I have a copy of it here.

Mr. ROTH. This product liability, this is extremely important because for years and years we've been running around the track on this product liability legislation, getting nowhere. Now in the Contract With America we have a vehicle, Mr. Chairman and members, to really get the job done. We have gone forward. This is a big step forward. But if we don't introduce alternative dispute resolution, we're not really getting to a big part of the problem. That's why this is so important.

Mr. MOORHEAD. Well, we appreciate your work that you've given us. We will see that it does get into the record.

I know everyone's anxious to get over and vote on this provision. We really appreciate your coming this morning. If you have any other suggestions you'd like to make to us, we'd appreciate it if you'd—

Mr. ROTH. Mr. Chairman, if we enact this bill as it's set up in the Contract With America and add this amendment, it can't be improved on because it would be perfect legislation.

Mr. MOORHEAD. It's going to be marked up in the full committee rather than in our subcommittee. So Henry Hyde will have a great deal to do with that, too.

Mr. ROTH. Thank you, Mr. Chairman.

Mr. MOORHEAD. The subcommittee is in recess for 15 minutes.

[Recess.]

Mr. MOORHEAD. Will the meeting come to order, please?

We have an opening statement or two that have not been given as yet. I'm going to call on, first, Congressman Hoke to give his opening statement.

Mr. HOKE. Thank you, Mr. Chairman.

I'm very much looking forward to this hearing today because I think that we have found ourselves in a situation where the pendulum has swung so far to the side of encouraging lawsuits in this country and we've become so litigious at tremendous expense to working people, and that's what I am concerned about. That's what the Contract With America is concerned about, and that's why we need common sense legal reform.

When you look at the various groups that are affected by the problem of a bias toward litigation as opposed as a bias toward either conciliation or arbitration or some sort of alternative, then you begin to see the depth and the breadth of the problem that we've got here. When you compare it to other nations that have been able to deal with the question of how you redress the legitimate and real damages and suffering that happen as the result of wrongs that have been either advertently or inadvertently made, then you see that we have placed ourselves under not only a tremendous disadvantage internationally, but, more importantly, we have done something to our society that both encourages the worst kind of behaviors between people and have reaped the results of that in terms of the economic detriment that it's created for all of us.

As with most of these kinds of difficult situations, what we find is that the people that are hurt the most are those at the lowest rungs of the ladder. What we're doing is putting a tremendous burden on the most—the best kinds of jobs, the best kinds of livelihoods in the manufacturing sector of our economy, and as a result of that, having fewer genuine, good, real jobs available for people in the middle class in America. We've done it. We've created the situation. We're here to try to figure out what we can do to create disincentives for so much litigation and for creating greater equity than we have today.

I have a lot more to ask these—the people that are going to be speaking before us. I'm looking forward to your testimony, and I'm very appreciative that you've put this together, Mr. Chairman. I'm very appreciative that we are going to get into the depth of this problem today and next week, as we mark up this bill. So thank you.

Mr. MOORHEAD. The gentleman from New York, Mr. Nadler, is recognized.

Mr. NADLER. Thank you. I will make a very brief opening statement.

I do not believe the legal system of the United States is in a terrible system of dysfunction and I am very nervous, to put it mildly, about the harmful effects that the so-called Common Sense Legal Reform Act would have on the rights of people who are damaged and to the Rules of Evidence. I look forward to this hearing for an interesting dialog on this question.

Mr. MOORHEAD. Thank you.

The gentleman from Pennsylvania, Mr. Gekas.

Mr. GEKAS. I thank the Chair.

We would like the witnesses to recognize and realize that their testimony is very important in these matters. Judging from what we heard the last time this subcommittee was convened by Chairman Moorhead and the discussions that it engendered, and the willingness of the chairman, Mr. Moorhead, to be flexible on the

various ideas that are coming out of the testimony and from the independent analysis of that testimony on sanctions under rule 11, on the loser-pays provision, for instance, we want you to know in the audience that these hearings are extremely important. We're not frozen as legislators into the original proposal and we're not frozen into the latest modification proposed, but in the legislative process, distilling what you prefer to us, and the ideas that the Members themselves are able to elucidate, we will make progress in balancing all the equities in these matters.

I want to commend Chairman Moorhead for conducting the meeting, the hearings in such a manner and being receptive to the consultations with individual members of the committee, to the benefit of the process and to the ultimate right decision that we're going to make on what we're going to be offering on the floor.

I thank the Chair.

Mr. MOORHEAD. Well, thank you.

Our first panel to discuss proposed amendments to the Federal Rules of Evidence 702, the admission of scientific evidence—testifying before us today are Dr. Franklin Zweig, Mr. Robert Charrow, and Mr. Anthony Roisman.

Dr. Franklin Zweig is president of the Einstein Institute for Science, Health, & the Courts located in Bethesda, MD. Previous to that, he was counsel and then special consultant to the Committee on Labor and Human Resources of the U.S. Senate, a visiting scholar in the U.S. Congress Office of Technology Assessment, and a full professor and most recently a senior research staff scientist with the George Washington University. In 1994, Dr. Zweig was a consultant on health care reform to the Judicial Conference of the United States. He has provided science education seminars to judges during the past years and advises many courts on scientific issues.

Welcome, Mr. Zweig.

Also on the panel is Mr. Robert Charrow. Mr. Charrow is an attorney with Crowell & Moring here in Washington. His practice focuses on issues associated with drugs, devices, and biologics; scientific research; biotechnology, and health care. He previously served as the Principal Deputy General Counsel and Deputy General Counsel of the U.S. Department of Health and Human Services, Acting Deputy Director of the Federal Home Loan Bank Office of Industry Development, and as an adjunct professor at the University of Santa Clara School of Law—evidently, in California. Mr. Charrow was also Chairman of the HHS Task Force on Scientific Misconduct, a member of the Secretary's Task Force on Medical Liability, and a member of the U.S. Attorney General's Torts Policy Task Force. He is currently a member of the Special Committee on Scientific Evidence of the American Bar Association and the American Association for Advanced Science.

Welcome, Mr. Charrow.

Our third witness on the panel is Mr. Anthony Z. Roisman. Mr. Roisman is of counsel to the law firm of Cohen, Milstein, Hausfeld & Toll here in Washington. He was the executive director of Trial Lawyers for Public Justice in Washington, a special litigator for, and prior to that Chief of, the Hazardous Waste Section of the Land and Natural Resources Division of the U.S. Department of

Justice, and an adjunct professor of environmental law at the George Washington University. He is a member of the Advisers Committee for the Most Recent Restatement of the Law on Torts and Products Liability of the American Law Institute, and was chairperson of the Education Committee of the Section on Toxic, Environmental and Pharmaceutical Torts of the Association of Trial Lawyers of America.

Welcome, Mr. Roisman.

We've got a very distinguished panel here today. Dr. Zweig, you may be the first, followed by Mr. Charrow and Mr. Roisman.

STATEMENT OF FRANKLIN M. ZWEIG, PRESIDENT, EINSTEIN INSTITUTE FOR SCIENCE, HEALTH & THE COURTS

Mr. ZWEIG. Thank you, Mr. Chairman. It is a privilege to be here and to testify before your subcommittee.

Last year I had the privilege of working with your subcommittee on assessing the potential impacts of health care reform legislation on the courts, and this year I testify about proposed changes to rule 702 of the Federal Rules of Evidence from a court-regarding perspective. Not from the perspective of a litigator or any one of the several points of the litigation compass, my focus is geared to two central questions, first, is there a problem? Second, the subcommittee were to report out favorably section 102 of H.R. 10, what might it do to and for the courts?

I have submitted written testimony, Mr. Chairman, and hope the subcommittee will permit the opportunity to amend and annotate. I will summarize very briefly the thrust of that 19-page document.

Mr. Chairman, the proposed changes to rule 702 are intended to cure a problem discerned by some folks, and not others; that is, junk science. It is not clear from independent surveys that the distortion of scientific evidence in the courts has reached a high pitch or great concern among the judiciary. On the other hand, there appears to be the appearance of difficulty with testimony by experts generally, not limited to scientists or those speaking from a scientific base judges are concerned that expert witnesses may elevate their loyalty to the party employing them above the objectivity they accord to their testimony.

In my written remarks, I summarize the surveys recently taken on this issue, Mr. Chairman. The survey does not establish a high level of problem assessment. But when you talk to judges, they are bothered, individually and anecdotally, by the appearance of a bought-and-paid-for expert witness industry.

My comments stem from judicial education efforts with which I've been involved in the last several years. They may not be representative, but there is a feeling of discomfort. The discomfort may arise as much from a growth industry heretofore unaccountable for rendering a public service than it is for the actual distortion of testimony in trials.

A lot of anecdotal writing suggests junk science and distorted witnesses, but it hasn't been borne out in many of the systematic studies either at the Federal or State level, Mr. Chairman. At the Federal level, the Carnegie Commission on Science, Technology, and Government found there wasn't a problem in Federal courts.

They published in a 1993 report that prior concerns were greatly exaggerated.

In probably the most thorough and comprehensive study of the matter in State courts, the issue was reviewed in California, Mr. Chairman, through your commission the future of California's courts. This monster volume I have here is a complete compilation of all of the research papers undertaken. I had the privilege of undertaking one of them, studying experts' opinions. Yankelovich, Skelly and Wright, a noted survey organization, surveyed the court using population and lawyers in representative samples. Nowhere did the issue of junk science and distorted testimony, what I call "junk witnesses," surface as a prominent problem in the study of California courts, the Nation's largest judicial system. Nevertheless, the junk science label has stuck, probably where witnesses have either mouthed scripted testimony or have elevated their loyalty beyond their scientific interpretation. In such instances, just testimony has been very prominent, very obvious, and sometimes it has blackened the eye of the courts.

Now what would the amendment to rule 702 do? Well, first, Mr. Chairman, it would only apply to Federal courts and not State courts, which, try the huge, the lions' share of cases in products liability, mass toxic torts, and medical negligence cases, where the furor has been cited by those who believe there is a problem. In focusing on the Federal courts, what this legislation would go way beyond what informally has been described as codifying the *Daubert* decision into statute. It may be said by some that section 102, the Honesty in Evidence Act, codifies a recent decision of the Supreme Court, but it does much more than that. It interposes in the Federal law a presumption of inadmissibility of scientific evidence. That's the act's anvil; it's hammer is to mandate of judges that they engage in a mind search of the expert scientific witnesses' to assure that in rebutting a presumption of admissibility the witness has engaged in valid scientific reasoning.

Scientific reasoning is a subjective side of science. Scientific research, the studies that are produced and upon which witnesses may found their testimony, is the objective side. I think that mandating the judiciary to explore the subjective side, Mr. Chairman, is a fruitless quest and one that could be, well, counterproductive.

These amendments could require an endless number of pretrial hearings on motions to rebut inadmissibility. They may, if interpreted to affect the criminal law, pose a major knot in the trial of criminal cases because all defense counsel will assert that every forensic witness' testimony is a priori inadmissible. If applied to the intellectual property cases coming before the Federal courts, Mr. Chairman, which is in the subcommittee's jurisdiction, a similar interposition of added procedures might be foreseen.

Now the patent bar deals with scientific subjects all the time, and, as far as I know, it has never been labeled as hospitable to junk science or testimony. We've been worried for some years about international trade and litigation—counterfeiting and the like. It is possible that this presumption of admissibility, coupled with a reasoning search, could frustrate litigation of international trade cases which our Nation needs to maintain our leadership in global eco-

nomics. Section 102 evades, it avoids the lion's share of the problem cases, the 98 percent of cases that are filed in State courts.

Would propose amendments to rule 702 cut down the number of cases? Well, it certainly could if the number of cases in which scientific testimony is prominent that is, compose a large portion of the cases coming before the Federal courts.

I see my time is up, and I'll make just one observation and a quick conclusion, if I may, Mr. Chairman.

The Federal Judicial Center has conducted some assessments of the proportion of such cases, and in a letter to you from Judge William W Schwarzer seems to say, that as few as 10 percent may be so afflicted.

I'll terminate with an observation. Judges are worried that expert witnesses are not accountable, that they've become a public utility. The subcommittee may want to look at additional remedies to reinforce that accountability.

Thank you.

[The prepared statement of Mr. Zweig follows:]

PREPARED STATEMENT OF FRANKLIN M. ZWIG, PRESIDENT, EINSTEIN INSTITUTE FOR SCIENCE, HEALTH & THE COURTS

INTRODUCTORY COMMENTS

Chairman Moorhead, Congresswoman Schroeder, and Members of the Subcommittee: Thank you for inviting my testimony before you this morning on legislation intended to improve the quality of justice, especially science and technology's role in criminal and civil trials. I had the privilege of working with you and your Subcommittee, Mr. Chairman, and your staff during 1994 in my capacity as the consultant on health care reform to the Committee on Federal State Jurisdiction of the Judicial Conference of the United States. I appear before you today from the perspective of judicial administration to testify on Sec. 102, the Honesty in Evidence Act, part of H.R. 10, the Common Sense Legal Reforms Act of 1995.

This testimony has been prepared from the adjudicator's case management perspective, not the viewpoint of the practicing bar whatever its orientation or specialty. Nor of the litigants, whatever their cause. My quest is to provide the Subcommittee with a neutral and balanced view of the proposed legislation's impact upon courts, especially upon the presiding federal judge who would be bound with new, and I shall argue, much more powerful and centralized duties to screen scientific opinion and evidence offered in both civil and criminal cases.

The proposed legislation would not affect state courts that manage, according to the Administrative Office of the U. S. Courts, more than 95% of the cases filed in the United States, except by example, through a federal model for later adoption among the several states.

Mr. Chairman, I retired this past December from The George Washington University—where I was Senior Research Staff Scientist for Law and Judicial Policy Studies in the Center for Health Policy Research—to head a technical assistance consortium for courts, the Einstein Institute, in the areas of science and health information and techniques. Our projects are advised by prominent judges and scientists. Our mission is to produce objective, even-handed, balanced videotapes, bench books, and background papers to help the courts better understand the scientific evidence they increasingly are called upon to manage in civil and criminal trials. We are releasing next week a video film and supporting guide books entitled *Science in the Court: Finding Your Way Through Mass Toxic Tort Cases*. We will release later this spring a manual on independent, neutral scientific information and experts for the courts. Our primer on genetic testing for forensic and civil trial use is nearing completion.

In attempting to make science information accessible and usable for courts, I have monitored the junk science issue over the past decade. The Honesty in Evidence Act, Mr. Chairman, also addresses a different, although related problem, one that I term the "junk witness" controversy.

IS THERE A PROBLEM?

Section 102 (b) of the Honesty in Evidence Act impliedly is addressed to the dual problems of invalid scientific evidence and unreliable expert witnesses. We have undertaken several original surveys of judges, court-related personnel, and other experts on these and related topics, as have a number of others. I have operated approximately 50 conferences and workshops for federal and state judges on these issues in the past five years. I can tell you that a lot of judges regard the junk witness phenomenon as a genuine problem, one that gives black eyes to a Judicial Branch that has retained, but could lose, the citizen's fragile confidence. Many experts worry about a loss of confidence in the justice system.

At the same time, it is not possible to know to what extent the Nation's federal and state judges, or experts and citizens, believe that junk witnesses, junk science or a syndrome combined of each pose major problems for the courts. Nor whether the enhancements of recent years to provide judicial standards for screening scientific evidence pretrial enjoy judicial confidence.

The Federal Judicial Center surveyed in 1992, pre-*Daubert*, 335 federal judges inquiring about expert witness problems in their then most recent trials. This survey asked for expert witness problem rankings. It is awaiting publication, and may help the Subcommittee.

In a small, random sample survey of state court Judges I directed in 1992 for a project on "Independent, Neutral Scientific Information and Experts for the State Courts" supported by the State Justice Institute, we found that a startling 80% reported presiding in a products liability case during the past five years. The principal problems these judges faced were conflicting evidence produced by different witnesses on the same issue. The greatest help an outside agent could provide the courts were standards for expertise adopted or utilized by scientific disciplines from among whom expert witnesses routinely testified in courts, part of our manual.

In a mixed sample of federal and state judges we surveyed with respect to future expectations for case management for the November, 1994 National Conference on Mass Torts, respondents expected that multiple parties and their evidence will increasingly be reviewed in nonbinding alternative dispute resolution proceedings. Little hope was expressed, however, that expert witness involvement would do anything but increase. Toxic substance litigation was predicted to increase with respect to 20 toxic substances, and decrease with respect to only 5 substances. And among the most difficult challenges dealing with expert witness testimony, slightly more than half (53%) of 106 judges participating in the survey ranked in first place "assessing scientific validity in the foundation of expert witness testimony."

The existence of a problem was addressed by the Carnegie Commission on Science, Technology and Government in the course of that prestigious body's 5 year study of the courts. The Commission published in its 1993 final report that junk science generally was not a problem in the federal courts, but that the increasing complexity of cases being adjudicated warranted assistance with scientific evidence, concepts, materials, and study interpretation. The Carnegie Commission's work was spurred in part by the Federal Courts Study Committee that in 1990 recommended additional attention to science in the courts. Carnegie's work in turned, spurred production by the Federal Judicial Center a few weeks ago of its Reference Manual on Scientific Evidence, and, the Einstein Institute's continuing work menu.

The Carnegie Commission's focus in part may have been sensitized by a book published by Peter W. Huber in 1991 that criticized only carefully selected decisions admitting scientific evidence in several tort areas, and proclaimed that the courts routinely admit unsubstantiated testimony. The book, *Gallileo's Revenge: Junk Science in the Courtroom*, is a staple in the tort reform literature. It was countered as to method, bias, and conclusions, by Kenneth Chesebro, plaintiffs' counsel in the *Daubert* case, in a 90 page article in the American University Law Review published in Summer, 1993. Still the label, junk science, appears to have stuck, and covers a lot of issues relating to causation of human illnesses from various environmental sources, workplace toxins, faulty products, and medical negligence under the pejorative label of "liability science."

Arguably the most thorough survey of federal and state courts to determine perceptions of expert witness problems was conducted by the Louis Harris organization from among 200 federal and 800 state court judges and reported in 1988. A later study was undertaken with respect to the then proposed Civil Justice Reform Act, but the 1988 study offers a good, clear view of both federal and state court opinions about expert witness problems in both civil and criminal contexts.

The Harris Survey, it should be noted, was conducted during an era in which the junk science and expert witness issues were being brought to a boiling point—when mass tort caseloads, lead by asbestos litigation, spiraled sharply upward; when

products liability caseloads were expanding, and the occasion of what is known as the second crisis in medical malpractice insurance following a repetition in litigation that peaked in the mid-1970's, subsided, and escalated again from 1985 to 1990.

Harris found that "Majorities of both State and Federal judges say that they either have no problems or not many problems with expert witnesses. However, sizable minorities say that they either have some problems or, in a few cases, a lot of problems." Harris also found:

An "overwhelming majority" do not believe that the rules relating to the qualifications of expert witnesses should be made either more or less restrictive
63% of state judges believed that state court rules made within three years prior to the study's conduct had cured earlier problem

One third of judges would favor greater limits on expert witness qualifications and subjects about which they would be permitted to testify, but "substantial majorities stand in opposition."

Greater use of scientific panels to advise courts was favored by 53% of the federal and 55% of the state judges

76% of the federal judges and 70% of the state judges would favor increased use of court appointed expert witnesses.

With additional studies conducted with respect to court-appointed studies since the Harris Survey by the Federal Judicial Center, and the finding that substantial majorities favor the use of such independent witnesses in the "right case" but only 20% have used FRE 706 and actually made an appointment, one must conclude that if a general scientific expert witness problem exists, it has not convincingly been established through surveys.

On the other hand, informal conversation with judge after judge has revealed great discomfort with the expert witness industry. Many judges are concerned not so much with the distortion of justice actually experienced in proceedings through unsubstantiated expert testimony as the appearance that any opinion can be purchased for the right price. Garish advertisements in lawyer's trade magazines virtually guarantee finding the right witness. Judges tell me that they are also bothered by expert witnesses employed by public agencies, such as the medical examiner or state crime labs in criminal cases, and corporations' scientific staff in civil proceedings. Whether the independence of entrepreneurial experts is regarded as more or less compromised than paid staff is not known. And the public has not registered an opinion, but it is not known to what extent peak events such as the O.J. Simpson trial and the public's growing interest in Court TV will galvanize an opinion. The courts generally have enjoyed the institutional confidence of the populace, a confidence that may be fragile in places where access to justice is "iffy."

Judges have indicated repeatedly in face-to-face gatherings, with little dissent, that the feature that bothers them most about hired expert witnesses is their unaccountability to any agent but their employing counsel. If expert testimony is a public good, as many judges appear to believe, a way should be found to register, certify, license or otherwise assure accreditation of expert witnesses who testify in civil and criminal trials. These sentiments could be subjected to survey analysis. With or without such additional information, the Subcommittee may well wish to explore such steps. A group of amendments can be proposed with respect to expert witness accountability for use at the Subcommittee's discretion.

The scientific community appears to have an opinion, again through comments gathered as anecdotes, and may not be representative. Busy, neutral, independent scientists generally do not want to become associated with parties' litigation. On the other hand, they want to help the courts and improve the quality of justice. They are comfortable in working for the courts, neutral-to-neutral, and frequently will agree to do so for little more than carfare.

Our experience with independent, scientific, court-appointed experts is limited, and studies of their use are thin. The Federal Judicial Center's studies are the most complete available. The American Association for the Advancement of Science, the umbrella organization uniting scientific societies and associations, is planning a demonstration to supply federal courts with court-appointed expert witnesses drawn from member scientific societies. It may be readied for operation this year, 1995.

Einstein Institute is planning a special effort with respect to genetic testing evidence in criminal and civil proceedings. A call to scientists attending the combined grantors/contractors conference conducted in November, 1994 by the Human Genome Project yielded 84 self-nominated candidates for assisting courts in the complexities of genetics-related cases. We plan to evaluate and train them this summer. The experiment will not yield good, systematic information for another two years, however. And we shall emphasize another feature about which the judiciary informally has mixed opinions: the use of non-party experts to provide science back-

ground briefings for juries, to enable their interpretation of the evidence in aid to their weighing such evidence in the course of a following trial.

OBSERVATIONS ABOUT SECTION 102

Informed in part by these perspectives and experiences, the following are observations about Section 102, the Honesty in Evidence Act. Its features are discussed with aid of reference to current law; possible impacts; strengths; weaknesses. It would be useful to draft an exercise simulating the application of section 102(b) in order to illustrate its possible operation in practice, but such hypothetical application was not undertaken for this testimony.

Section 102(b)

Section 102(b) *Adequate Basis for Opinion* is the principal engine of the Honesty in Evidence Act. If enacted as drafted, it could result in a 180 degree turn in the management of scientific evidence in federal courts. By inserting into the evidence law a presumption of inadmissibility of expert witness opinions based upon scientific evidence, it would reverse the direction of evidence jurisprudence in the federal courts enacted in the federal rules in the mid-1970's, P.L. 93-595 as amended. They presumed admissibility, with appropriate conditions and safeguards.

The FRE have been built-upon steadily since then, especially under new directions for judicial screening of scientific evidence set forth in mid-1993 by the U.S. Supreme Court in a products liability case, the now famous *Daubert* case. In addition, the Federal Rules of Civil Procedure have been amended to improve scientific evidence management, especially Rule 26(a) requiring a duty for early disclosure and information exchange. It is too early to know to what extent courts effectively have implemented *Daubert* and the Rule 26 amendments. But efforts exist in every district and circuit to familiarize courts with their standards, requirements, and concurrent use.

The Daubert Decision and Section 102(b)

Daubert v. Merrill Dow Pharmaceuticals, Inc. 113 S. Ct. 2745 (1993) is a key factor for the Subcommittee's consideration as deliberation of section 102(b) proceeds. Prior to 1993, very severe evidence restrictions were posed by the case law of some circuits in civil cases, and very liberal requirements guided others, with prominent conflicts among the decisions of the U.S. circuit courts, especially in toxic torts cases. The U. S. Supreme Court granted certiorari to a case in which two boys who suffered limb reduction deficits before birth alleged their defects were caused by the morning sickness drug Bendectin. The plaintiffs proffered for introduction into evidence an unpublished study by an epidemiologist expert witness purporting to show that Bendectin did cause birth defects. Most verdicts had favored the defendant company in Bendectin litigation, partly, perhaps largely, upon showings of scientific evidence exonerating the drug's role in birth defects. The trial judge applied the scientific acceptance rule enunciated in *U.S. v. Frye*, citation omitted, excluded the evidence, and granted summary judgment for the defendant. An appeal to the 9th U.S. circuit court of appeals sustained the trial judge's ruling.

With an astonishing number of briefs filed *Amicus Curiae*, the U.S. Supreme Court reversed and remanded, setting forth four standards upon which judges may make findings under Rule FRE 702. These standards include the proposition tested by the scientific studies asserted; the tests used and their error rates; the peer review status of the proffered evidence; and the state of scientific acceptance or lack thereof.

The decision did not address or solve all the issues, especially with respect to technical or medical, as opposed to scientific, evidence. But it provided benchmarks for screening scientific evidence. Those benchmarks were applied by the 9th Circuit in the remand of *Daubert*. The trial court's decision in that case was again affirmed in a January 5, 1995 decision, and the *Wall Street Journal* editorially pronounced that junk science had come to an end.

Judicial Screening Duties Under Daubert

More important in my view of the decision, it shifted judicial duty away from pre-trial application of a single rule and into original and direct evidentiary screening. It established a judicial duty to assure the scientific validity of the proffered evidence, a term synonymous with scientific reliability. The Supreme Court required that trial judges must look beyond a conclusory opinion, and assess the evidence's methodology. This was indeed a major step.

Although *Daubert's* primary decision to incorporate into and supersede the Frye Rule by the Federal Rules of Evidence (and to subordinate it as one of the four

screening factors) was decided by a unanimous court, Chief Justice Rehnquist and Justice Stevens dissented in part to the difficulty that establishing judges as "arm-chair scientists" might pose for the courts.

Section 102(b) and Daubert Screening

H.R. 10's Section 102(b) has been described informally as a codification and statutory incorporation of *Daubert*, Mr. Chairman, but a dispassionate assessment must observe that it goes way beyond the structuring of standards for assuring the reliability of scientific evidence and testimony in conduct of a judge's duty to screen the evidence. Section 102(b) is an entirely different species of evidence law than the one currently applied by the federal judiciary in the management of federal trials according to FRE 702, and its other provisions.

Current law assumes the admissibility of evidence, conditioned by relevance proofs, exceptions, balancing tests, and other safeguards.

Section 102(b) assumes the opposite. Inadmissibility is the safeguard, admissibility the exception. *Daubert* screening duties and criteria are not discarded. But they presumably would be added to first and controlling requirement in section 102(b)(1) that a judge finds the expert witness opinion based on scientific evidence to be "based on scientifically valid reasoning."

Section 702, current law, requires any party to advance its experts witnesses and requires the presiding judge to qualify them to testify, by opinion or otherwise, if found by the court to be "qualified by experience, training, skills, and experience to assist the trier of fact."

As proposed in H.R. 10's section 102, the standards and process for qualifying an expert witness would remain unchanged, but that witness's testimony, in the absence of prevailing rebuttal, would be excluded from a party's case.

Current law, including the important refinements added by the U.S. Supreme Court in its *Daubert* decision, emphasizes scientific *methodology* relied upon by an expert witness as the subject for pretrial judicial screening inquiry. Section 102 sets forth the scientific *reasoning* of the expert witness as the subject for pretrial judicial screening inquiry. This change is not procedural or trivial; it is a quantum transformation of legal philosophy and of duties imposed upon the presiding judge.

Articulation with FRE 403; Re-Codification

In contrast, Sec. 102(b)(2) appears to ratify current practice guided by the FRE. Judges balance the probative value of proffered evidence routinely against its propensity to prejudice, confuse or mislead a jury. This provision appears to actually re-codify current law, whereas Sec. 102(b)(1) reverses current law through interposition of the inadmissibility presumption.

Some Procedural Implications and Impacts

Section 102 turns off the scientific evidence faucet by introducing into the federal rules an initial, a priori, rebuttable presumption of scientific evidence's *inadmissibility*. While it does not prevent the introduction into evidence of documentary and demonstrative evidence per se, the proportion of such evidence introduced without an expert witness is estimated to be trivial. Almost all scientific evidence would be inadmissible at the outset of all litigation.

Presumably this would include forensic evidence in criminal trials. Clearly it would include evidence adduced in intellectual property and international trade cases.

The policy assumption underpinning this provision appears to be that expert witness opinion based upon scientific evidence is inherently and substantially, if not completely, unreliable. So unreliable as to endanger the administration of justice. A corollary of this assumption is that expert witness opinions are sufficiently damaging the administration of justice to such an extent that an extremely strong remedy is needed through Congressionally-mandated judicial policy.

This evidence policy choice—section 102(b)—would force any party seeking to introduce scientific evidence in any criminal or civil proceeding to rebut and overcome the evidence law's presumption of inadmissibility.

Section 102 could remove evidence and expert witness stipulation as a party option by automatically ruling out all testimony. The body of Section 102 provides the anvil for the exclusion of scientific evidence; section 102(b)(1) provides the hammer.

Section 702 in current law, requires any party to advance any expert witness and the court must then qualify that witness as fit to testify by opinion or otherwise if found by the court to be "qualified by experience, training, skills, and experience to assist the trier of fact" As proposed in H.R. 10's section 102, the standards and processes for qualifying an expert witness would remain unchanged, but that wit-

ness, whether street chemist or Nobel laureate, in the absence of prevailing rebuttal, would be excluded from a party's case.

Section 102's policy is enforced by the presiding judge. The judge must determine whether a party has carried its burden, has successfully rebutted the presumption of inadmissibility by proving the scientific reliability of the expert witness's proffered testimony, and must rule on a motion for admissibility. Unless specifically found to be admissible, every witness in every case would be barred by operation of law from testifying.

Moreover, additional law, adduced either by Congress or the Supreme Court, could be required to aid a trial judge's search of each experts' scientific reasoning capability in order to find it scientifically reliable or unreliable.

From a procedural perspective, in order to rebut the presumption of inadmissibility, the party wishing to introduce scientific evidence would introduce a motion, and, if not granted through the papers, move for a hearing. It is likely that no written motion and its supporting affidavits and exhibits would suffice, however. Because objections would be lodged without limit against a judge who failed to examine an expert witness directly for her or his "scientific reasoning." How can a judge make findings about scientific reasoning in the absence of such direct examination. The court could propound interrogatories to witnesses. This would require federal and local rules to determine what form and what questions are to be asked uniformly and with respect to specific case types, contoured to a specific case. The expert hours spent in answering the judicial take-home exam could be legion. Substantial satellite litigation also can be envisioned.

Thus a hearing would likely be requested in every case with respect to every expert witness for the purpose of the "scientific reasoning" inquiry. Of course, the hearings could be consolidated, but every witness may be required to be present for examination or be disqualified from testifying.

OTHER POSSIBLE IMPACTS OF SECTION 102(b)

What impact could or might section 102(b) have on the courts, the parties, and the expert witness industry? Aware that forecasting for small changes can harbor unanticipated monumental consequences, and that expected quantum leaps can turn out to merely be pebbles in our shoes, some conjectures can be made more confidently than others. I believe the committee might wish to consider the following impact categories: (1) what section 102 requires of the adjudicator, the presiding judge, (2) what impact section 102 may have upon the federal courts as an institution; (3) what impact section 102 could have upon would have upon the parties.

IMPACT UPON THE ADJUDICATOR, THE PRESIDING JUDGE

Escalating Powers

By the very shift of control over expert witness testimony of the proposed section 102, presiding federal judges might be handed unprecedented powers over the content and direction of cases. As an evidence gatekeeper, each judge would have virtually unlimited discretion to open his or her particular gate in each case to a trickle or a torrent of evidence. In American jurisprudence, significant deference is granted evidentiary rulings made by the trial judge. With an inadmissibility presumption and rebuttal procedure reinforced by a finding of witness reasoning invalidity, that deference could become an absolute license.

Shift Toward Inquisitorial Proceedings, Away From the Adversarial System

In some respects the proposed evidence regime could result in a major pre-trial of the case prior to its going to trial. In some respects, the inadmissibility presumption, reinforced by the judicial reasoning examination, garnished by a *Daubert* assessment, could be a searching review of the substantive foundation of a case. Judges may conduct proceedings less in form and nature than the proceedings customarily guiding the current adversarial approach to dispute resolution, more in the inquisitorial form. If so, section 102 might bridge and merge the current division of litigation labor, wherein the law is applied by the judge, the jury weights and determines the facts, and the parties put on the case and bear their respective burdens in proving it. Case management for the court might tend to become case conduct.

Many More Pretrial Hearings, Costs

Whereas evidentiary hearings pretrial are currently appropriate in some cases when moved by the parties, the inadmissibility presumption virtually guarantees a hearing for every witness in every case. These pretrial hearings are shouldered by

the parties, but the inquiries prompted by section 102 would require that the presiding judge take responsibility for arranging and directing the hearing, especially as concern expert witness "reasoning" examinations. The required law clerk and administrative support, judge time, and judicial resources could be large, although a formal impact assessment is required for a useful estimate of caseload and budgetary burden.

Specialized Quasi-Judicial Personnel

Doubtful that the prospect of section 102's impact upon judges would be welcomed, the demand for appointment of special "evidence" masters might soon be heard. This development might be viewed hospitably or with hostility, but the financial costs could mount quickly when universal application of the rule and procedure would be assured by operation of law.

Possible Advantage: Case Reduction

Caseloads could be reduced in civil litigation: if evidence is inadmissible then a summary judgment motion must be granted for the defense on the basis that no genuine issue of fact can be proved. This would keep junk evidence and witnesses out of the courts. It would also could block truly meritorious parties' causes of action.

Cases could be thrown out routinely in criminal trials as judges find that otherwise qualified evidence technicians who are not professors or bench scientists cannot explain the scientific foundation of their fingerprints or drug assays or breathalyzer tests from a scientific reasoning perspective. Or for that matter, from the published scientific research.

Crime Improvement Frustration

Related to case reduction, objectives of Congress' multiple efforts to reduce crime could severely be frustrated. The criminal defense bar would have incentives to challenge every piece of evidence in every case, creating a jumble at best, an impenetrable logjam in some courts.

Expert Witness Resource Reduction; Contingent Fee Prohibition

The proposed legislation, Mr. Chairman, could reduce the size, volume, and economy of the expert witness industry. Presumed inadmissibility may well turn some professional expert witnesses toward what some think may be more honest pursuits. But it also could dry up a source important to evidence in criminal cases justifying acquittal; and in civil cases where the plaintiff is not affluent. Court-appointed expert neutrals would have no incentive to perform their public services. At the same time, I am under the impression from information provided by knowledgeable judges, but uninformed by empirical study, that contingent fees for expert witnesses are not common. And they tend to be effected under the table, disguised as yearly bonuses, gifts, or higher than usual rates in subsequent cases.

Forum Shopping; Satellite Litigation

It is possible that failure to have expert witness opinions admitted in federal courts applying the federal rules could promote filing in state courts, as pendant jurisdiction cases in applying the most favorable evidence law where jurisdiction is conferred by 28 U.S.C. 1332, the statute governing diversity of citizenship. It has hard to believe that the bar will accept the strictures imposed by section 102 easily. Appeals and satellite litigation may be expected.

Loss of Assistance to the Trier of Fact

Mr. Chairman, the difference between the complex litigation and prosecution of the current era from the garden-variety litigation or prosecution of even a decade ago is the thousands of scientific studies marshalled to prove a party's case. Tens of thousands of studies of every description, subject, and result are produced—some published, some not. Novel scientific information and the technologies derived from them were once uncommon. Today, with the information superhighway connecting 400,000 scientists and an expected doubling next year, we are experiencing an infinite expansion of scientific studies. Discoveries are announced every day—from treatments for sickle cell anemia to the health effects of dioxin to the genetic causes of fat and cancer and learning disabilities and violent behavior.

Some are scientifically reliable, that is are validated by accepted procedures, and others are not. But studies and research can be objectively assessed for their reliability, for their strengths, weaknesses, and for their power, that is ability to convince. Using *Daubert* standards can help presiding judges. They provide a check-list for judicial findings. But courts could be lost without expert witness participation

in the process. They are the funnels and organizers of research outpouring of the scientific and technical establishments that fuel our economy and inform our society. We have considered putting courts on-line with scientific databases and have repeatedly been told by our judicial advisors that courts lack the work force to review studies.

The issue recently has arisen with respect to medical practice guidelines issued by a federal agency. The agency cited in excess of 10,000 journal articles as the probable universe of its search for the best methods to control post-operative pain. Expert witnesses are absolutely essential to the sifting and pruning necessary to make the scientific literature comprehensible even in this rather narrow matter.

Does this mean that the junk witness problem is a ghost? No, it does not, but it is difficult to know how much the appearance of a problem and its reality are congruent.

Now the courts are authorized to appoint their own witnesses. They tend not to do so. They fear that the court's witnesses will be accorded special weight by juries, and thereby tilt the playing field. The Federal Judicial Center reports that over 80% of judges they surveyed supported the concept of court-appointed experts, but that only one if five, 20%, used the procedure set forth in FRE 706 at least in one case. Here, better methods for recruiting and deploying court-appointed witnesses could help the courts greatly.

A Return to the Scientifically Valid Reasoning Standard

Reasoning processes are the software of the scientific process, while published studies are its hardware. Study design follows an accepted pattern. It can objectively be assessed. But the mental processes leading to it may not even be apparent to the scientist, because there is a lot of informed intuition in study design and conduct, intuition that may be documented, but courts of law are not equipped to do so even if it were desirable to do so. Reasoning may go into study design and produce scientific facts. Or accidental findings may be discovered by a reasoning mind. In either case, the reported research is what counts. The court consumes the cake baked by science, not the recipe originally created by the cook. Scientific research is held up to scrutiny by its data and by its replication, and most of all, by its survival when challenged by subsequent researchers.

CONCLUSION

The Einstein Institute's name was chosen, Mr. Chairman, after a long search to commemorate a tradition of scientific excellence, neutrality, and integrity respected by America's federal and state judiciary. Einstein believed that the intuitive mental processes and psychological drives of scientific inquiry were subjective and in many cases biased by the very questions the scientist sought to ask. The products of experiments and studies on the other hand, tend to be objective, with biased culled out in adequate procedures and peer-review critiques. Should the Subcommittee report favorably section 102, I respectfully recommend that it feature judicial review contoured to the scientific product presented in evidence, and not mire in the courts in examination of scientists' subjective side.

Thank you for the opportunity to share these thoughts with you about the important legislation now before the Subcommittee.

Mr. MOORHEAD. Thank you, Doctor.

Mr. Charrow.

STATEMENT OF ROBERT P. CHARROW, ESQ., CROWELL & MORING

Mr. CHARROW. Thank you very much, Mr. Chairman, members of the subcommittee. It's an honor to be appearing here today to be discussing with you the issues posed by section 102 of H.R. 10, which seeks to amend the Federal Rules of Evidence, rule 702.

I'm going to address just a few issues and I'd like to discuss those with the subcommittee because I think they go to the core of what the debate is about. This is a complex debate. It involves complex issues. It involves, after all, law and science, neither of which is simple. It involves the intersection of the two disciplines, which some commentators have likened to a shotgun wedding, a

marriage born more out of necessity than out of love. They are different disciplines, and they operate differently. I think that the committee's amendment takes that into account. It recognizes how science operates and merely requires that the courts ask scientists, when they are testifying as to opinions, to follow the same standard that they would follow at professional meetings.

The first point I think is self-evident. Science is complicated. I deal with it every day in my practice, and I'm trained as a scientist, and sometimes I'll sit down and I'll be listening to a scientist talk to me and I'll say, "Is that English?"

Because science is so complicated, the courts and others use experts, but the purpose of an expert witness in our Federal system is very limited. The purpose is to assist the trier of fact, to help the trier of fact, whether the trier is a judge or a jury, understand what's going on. I like to view it as transforming the courtroom into a classroom. That's what the expert testimony ought to be about. The question is: How well are the experts serving that function? Are they hired guns or are they really teachers?

Right before I came here to testify, my monthly issue of the California Lawyer arrived, and I just went into the back of it in a section called "Marketplace," and we have pages devoted to expert witnesses selling their wares. So there is, in fact, an industry in expert witnesses. I don't think all of these folks are really teachers. The interesting thing is that the expert section starts right next to an ad for Swiss bank accounts.

[Laughter.]

Mr. CHARROW. Mr. Chairman, the third point that I'd like to make with the subcommittee is that while there are benefits, indeed, real benefits, associated with expert testimony, there are also basic and fundamental dangers, and those dangers are actually built into the Federal Rules of Evidence.

First of all, we give experts wide latitude in testifying. The rules that apply to ordinary lay witnesses, don't apply to experts. We require that lay witnesses testify based on firsthand knowledge. That doesn't apply to experts. We require that lay witnesses not testify about most forms of hearsay. That doesn't apply to expert witnesses. We require that lay witnesses not answer hypothetical questions. That doesn't apply to expert witnesses. And hypothetical questions, as a litigator, I can tell you can be very pernicious.

There was a famous study—and I'll share it with you—done by Dr. Elizabeth Loftus of the University of Washington a number of years ago in which she showed subjects videotapes of a white automobile driving along a country road, and she asked them after they viewed the videotape, "how fast was the white car going when it passed the barn along the country road?" And people wrote down their estimates of speed. A week later the subjects came back and were asked a bunch of questions about the videotape. One of the questions was, "Was there a barn?" Many of the people who heard that question said yes. In fact, there was no barn in the videotape at all, but they had heard the question that had the word "barn" embedded in it, and a week later when they came back, they thought there was a barn in the videotape.

So the hypothetical question which embeds information can be very dangerous, but experts are permitted to answer hypothetical

question. Of course, experts are permitted to give an ultimate opinion, the ultimate opinion the jury has to resolve: Was the doctor negligent? Did this chemical cause this disease?

Now we do know, counterbalancing these dangers, there is supposedly one safeguard built into the evidence code and our system of justice, and that's cross-examination. But is cross-examination all that effective? Remember, why is the expert there? The expert is there because this is stuff that the average juror—and, indeed, the average attorney—doesn't understand. So it's unlikely that the average juror is going to comprehend weaknesses in the expert's testimony that are brought out during cross-examination.

Also, in a very sobering study conducted by Dr. Molly Treadway Johnson, now with the Federal Judicial Center, which she did in Baltimore, she wanted to see how well expert testimony can really help jurors understand epidemiology. She took 25 subjects who were jurors in Baltimore, showed them some very simple epidemiological tables, and asked them to answer four questions. Of the 25 subjects tested, 8 percent got all four of the questions correct—fairly low.

She then did another study with jurors from the same court. She showed the videotape of a scientist explaining epidemiology with concrete examples. She then gave these jurors the same tables, and she then asked them the same four questions. Remember, in the first group, 8 percent got all four questions right; the second group, which had education, 7 percent got all four right.

In her assessment of the ability of lay jurors to comprehend complex epidemiological testimony she held not great. Therefore, cross examination of expert testimony is not likely to be all that effective.

Now, as has been pointed out, the U.S. Supreme Court in June 1993 went a long way toward helping to bring some sanity back into the expert process. The Court opinion in *Daubert* did a number of things. Most importantly, it instructed trial judges that it is their job to act as gatekeepers, to sift out the good science from the pseudo junk science. Heretofore, judges, many judges, were not doing that. They operated under the let-it-all-in philosophy and let the juror and jurors sort it out for themselves. The Court said that is no longer going to pertain in the Federal courts.

Second, the Court held that before scientific evidence could be admitted, the opinion—must be based on valid scientific reasoning, and that is right in the *Daubert* opinion. That's precisely what this bill does. It requires that the opinion be based on valid scientific reasoning. It doesn't require one to get into the minds of the expert witnesses.

There is a way to ascertain whether an opinion is based on valid scientific reasoning. For example, suppose that an expert epidemiologist is testifying in a case about a study that he performed or she performed, and the expert says, well, there is a statistically significant association between chemical A and disease B; therefore, in my opinion—here's the ultimate opinion, a fact—therefore, in my opinion, chemical A causes disease B.

The study the epidemiologist undertook is scientifically valid, let's assume. Let's assume it was perfectly performed. Let's even assume it was published in a peer review journal. The study is

flawless, hypothetically. However, would any epidemiologist take the data from that study and draw the ultimate conclusion? No. You need lots of studies, not just one, before drawing a causal relationship in epidemiology.

There are also a variety of other criteria that must be met. These are usually referred to as Hill criteria. So, in short, while the data and techniques that the scientists used were perfectly valid, the ultimate conclusion drawn was not based on valid scientific reasoning, and no scientist in theory should draw that conclusion based on those data. That's what we're talking about—bringing common sense back into the judicial process.

Thank you very much.

[The prepared statement of Mr. Charrow follows:]

PREPARED STATEMENT OF ROBERT P. CHARROW, ESQ., CROWELL & MORING

Mr. Chairman and members of the subcommittee: At the turn of the century, Judge Learned Hand raised a question that goes to the heart of this hearing:

No one will deny that the law should in some way effectively use expert knowledge wherever it will aid in settling disputes. The only question is as to how it can do so best. [Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 40 (1902).]

I am honored at being asked to share with this subcommittee my thoughts on scientific evidence, in general, and the provision in H.R. 10 (The Common Sense Legal Reforms Act) which would amend the Federal Rules of Evidence to require, among other things, that expert scientific opinions be based on "scientifically valid reasoning." This is not a Republican issue and it is not a Democrat issue; it is not a plaintiffs' issue nor is it a defendants' issue. Rather, it is an issue that goes to the core of rational decision-making in our courts and to the integrity of our judicial process.

For over 20 years, I have been deeply interested in the intersection of law and science—two disparate disciplines. The relationship between science and the law has been likened to a shotgun wedding—a marriage born of necessity rather than of love. See Devra Lee Davis, *The Shotgun Wedding of Science and Law: Risk Assessment and Judicial Review*, 10 COLUM. J. ENVTL. L. 67 (1985); William Ruckelshaus, *Science, Risk and Public Policy*, 221 SCIENCE 1025 (1983) (science and the law are uneasy partners). Given the basic differences in the two disciplines, scientists have been striving to understand better the peculiarities of the legal system and lawyers have been struggling, frequently in vain, to comprehend the intricacies of science. The courts and legislatures, both at the federal and state levels, have been thrust into the middle and have been asked to serve as marriage counselors.

A rational system of dispute resolution should among things ensure that governmental organs—including the courts—do not ordain laws of science that are inconsistent with those held by the scientific community. In that regard, I am reminded of Indiana General Assembly House Bill No 246. That bill, introduced in 1897, would have made the irrational number π (3.14 . . .) equal to 4.0. The bill actually passed the house and had the strong support of both the state superintendent of public instruction and, as I understand it, the vast majority of 8th grade students throughout the state. Thankfully, it failed to pass the state senate. See Robert C. James, *UNIVERSITY MATHEMATICS* 131 (1963).

It used to be that issues of science only surfaced in court where the case involved a patent dispute or some novel technique for ascertaining identity or truth, e.g., polygraphs, HLA testing, nuclear activation analysis, voice printing and the like. That is no longer the case. Trials involving issues of pure science are fast becoming the rule rather than the exception. As more and more cases involving questions of science wend their way through our courts, judges and juries are being placed in the unenviable position of having to arbitrate disagreements over complex issues, many of which have divided the scientific community. While this may be a natural and unavoidable consequence of the technological revolution, it is not without peril. Before a judge or a jury can render a reasoned decision, each must be able to comprehend the underlying science. In theory, the expert witness ought to help this process along. After all, the function of the expert witness is to "assist the trier of fact." Information which needlessly confuses jurors or judges is an impediment to reasoned decision-making and should not be admitted.

In crafting rules of evidence, we must be ever mindful that we are not operating in a vacuum. Those rules affect the litigants, the lawyers, the judges and most significantly, the jurors. The expert testimony is there to assist the jurors understand matters that are beyond their common experience or knowledge. However, expert testimony is not necessary if it amounts to little more than speculation. The average juror can speculate on his or her own.

Expert testimony is extraordinarily powerful. It can, and frequently does, influence decision-making far more than lay testimony. Dr. Michael Saks at the University of Iowa Law School reports that in one survey, 70% of respondents polled believed that juries found scientific evidence more credible than lay evidence. However, many of the safeguards that traditionally pertain to lay witnesses simply do not apply to experts. Experts are free to render opinions not based on firsthand knowledge. They can testify about otherwise inadmissible hearsay (see Fed. R. Evid. 703 and 803(18)) and can respond to hypothetical questions. See Fed. R. Evid. 702, 703, and 705. Most significantly, of course, experts can testify about ultimate issues of fact to be decided by the jury. For example, experts are permitted to testify that a product caused a particular harm, that a chemical caused a specific ailment and that a given piece of machinery was defectively designed.

It is precisely because experts are afforded this wide latitude and can have such a powerful impact on the jury, that we must take care to ensure that expert testimony actually serves its legitimate function—to assist the trier of fact. Unfortunately, many of the protections—such as cross examination—that we rely upon to ferret out the truth may not be effective when applied to experts. Effective cross examination presupposes that the jury will be able to understand the testimony and thus appreciate the weaknesses made evident during cross examination. There is no such presupposition in the context of expert testimony. To the contrary, the very reason for permitting expert testimony in the first place suggests that lay fact finders may not be able to fully comprehend and evaluate the testimony before them. The intricacies of the Second Law of Thermodynamics, the limitations of a Poisson probability mass function, or the workings of the human immune system at the molecular level are not likely to be intuitively obvious to the average layman or for that matter, even to scientists not trained in the specific discipline involved. The years of education and training necessary to understand these subjects cannot be compressed into a one day, one week or even one month.

A study performed by Dr. Molly Treadway Johnson, now of the Federal Judicial Center, paints a sobering picture. Dr. Johnson designed her study to ascertain the extent to which expert testimony actually "assists the trier of fact" in better understanding epidemiological information. Dr. Johnson's study is particularly *apropos* because epidemiology has become the linchpin of many personal injury actions where a plaintiff alleges that exposure to a particular chemical or use of a particular drug caused a specific ailment.

In her first experiment, Dr. Johnson recruited 25 individuals who had been called for jury duty in Baltimore City Circuit Court. These individuals were given simplified tables summarizing the results of two epidemiological studies, one of which showed a statistically significant association between a given compound and a set of symptoms and the other which did not. The jurors were then asked two yes or no questions about each study. Of the 25 individuals, only 2 (8%) responded correctly to each of the four questions asked. The average correct score was 41%, a score that is below chance.

In the second experiment, 45 individuals from the same court were shown the same tables as those in the first experiment. However, before these jurors were shown the tables, they viewed a videotape in which a scientist explained how epidemiologists analyze and interpret data. Concrete examples were given.

The individuals in this group were asked the same four questions as had been asked in the first experiment. Overall individuals in this second experiment performed no better than those in the first experiment. Of the 45 individuals, only three (7%) answered all four questions correctly. Dr. Johnson concluded that

[t]he results of Experiments 1 and 2 paint a rather dismal picture of lay jurors' abilities to understand epidemiological analysis. Subjects began with a poor understanding of epidemiological reasoning, and apparently were not helped when provided with expert testimony. Molly Treadway, AN INVESTIGATION OF JUROR COMPREHENSION OF STATISTICAL PROOF OF CAUSATION 88 (1990).

It is clear from the Johnson study, and others that have examined the functioning of the jury system, that the effectiveness of expert testimony in actually assisting the trier of fact is open to serious question. While one can hope to transform a courtroom into a classroom, the current system imposes impediments to the learning

process. Until recently, many federal courts were unwilling to exercise their supervisory responsibilities. As a result, all sorts of evidence were admitted. This transformed the courtroom not into a classroom, as one would have hoped, but rather into a chaotic arena where hired experts did battle. This was neither healthy nor useful. Indeed, one federal judge commented in a recent study conducted by the Federal Judicial Center that

the Rules need modification. The principal expert problem is confusion by jury when experts on opposite sides, within the same discipline, testify to opposite conclusions.

Two terms ago, in *Daubert v. Merrell Dow Pharmaceuticals*, the Supreme Court took a large step toward bringing some sanity back into the process. The Court emphasized that it is the responsibility of the trial judge to act as a gatekeeper and to decide at the outset whether opinion testimony proffered by an expert constitutes "scientific knowledge" that "will assist the trier of fact." The Court held that before an expert opinion could be admitted (1) it must be based on scientifically valid reasoning, and (2) the techniques and methods underlying the opinion must be scientifically sound. To help courts differentiate between those techniques that are scientifically sound from those that are not, the Supreme Court articulated a set of four guidelines. Those four guidelines are as follows:

1. Can the theory or technique be tested, in the scientific sense;
2. Has the theory or technique been subjected to peer review;
3. In the case of a particular technique, is the known or potential error rate acceptable; and
4. Is the theory or technique generally accepted within the relevant scientific community.

Many federal courts have been carefully applying those guidelines. In some instances, expert opinions that do not measure up to scientific norms and that might otherwise have been admitted, are now being excluded under *Daubert*. This is as it should be. In other cases, though, the federal courts have misunderstood *Daubert* and have admitted evidence that should have been excluded. Part of the difficulty stems from the simple fact that courts have focused almost exclusively on the *Daubert* guidelines—guidelines which focus solely on the techniques that the expert used to generate the data underlying his or her opinion and not on whether that opinion itself constitutes "scientific knowledge." Lost in the *Daubert* opinion, but still very much there, is the additional requirement that the reasoning underlying the "testimony [be] scientifically valid."

The distinction between the scientific validity of the reasoning used to form the opinion and the techniques that provide some of the data underlying that opinion is critical. For example, suppose at trial an expert concludes that chemical A caused disease B. The expert bases her conclusions on an epidemiology study that she performed which showed there was a statistically significant association between the chemical and the ailment. Her study was conducted according to the scientific method; her results were published in a peer reviewed journal, and the methodology she used in conducting her study is commonly accepted in the scientific community. Should her opinion that chemical A causes disease B be admitted? I submit that it should not be admitted because the reasoning she used is "not scientifically valid." In epidemiology, no cause-and-effect conclusion should be or can be drawn based on a single study; indeed, no cause-and-effect conclusion is warranted, even if there are multiple studies, unless many of the nine Hill criteria have been met.¹

H.R. 10 codifies the *Daubert* requirement that the opinion be based on scientifically valid reasoning. In so doing, the bill attempts to refocus the attention of lower courts on the entire *Daubert* opinion and not just on that part of the opinion that relates to methods and techniques. In short, the proposed amendment would require

¹The factors justifying a cause-and-effect relationship were posited three decades ago by Sir Austin Bradford Hill. First, the association must be strong. Second, there must be consistency, namely the association should have been repeatedly observed by different researchers, in different places, under different circumstances and at different times. Third, the association should be specific; exposure should link up with a specific ailment or set of ailments. Fourth, there should be a temporal relationship between the agent and the ailment. Fifth, there should be a dose-response relationship. As the dose or exposure increases, the likelihood of contracting the ailment should also increase. Sixth, the association should be biologically plausible. Seventh, the association should be coherent; it should not conflict with known facts about the biology of disease. Eighth, ideally, there should be experimental verification of the association. Does the frequency of the ailment decrease, if individuals are not exposed to the agent? And finally, in some circumstances it would be fair to judge by analogy to other effects involving related agents. See Austin Bradford Hill, *The Environment and Disease: Association and Causation?* 58 PROC. ROY. SOC. MED. 295 (1965).

not only that the techniques themselves satisfy the *Daubert* guidelines, but also that the opinion itself be a product of valid scientific reasoning. If it is not the product of valid scientific reasoning it does not constitute "scientific knowledge." It should be noted that over 56% of the Federal Judges surveyed by the Federal Judicial Center favor amending the Federal Rules of Evidence to increase the threshold for admitting expert testimony in civil cases.

I commend the supporters of H.R. 10 and those who are considering supporting it. Their efforts will ensure that the science that jurors and judges hear in a courtroom is not inferior to the science that scientists and researchers hear at their professional meetings. In that regard, I would recommend that the committee consider inserting language that would make clear that the amendment in H.R. 10 is not intended to undermine or otherwise relax the four guidelines in *Daubert*. Simply stated, the House amendment relates to the reasoning used to reach an opinion which presupposes that the techniques and methods underlying the opinion meet the *Daubert* criteria.

Mr. Chairman, before I conclude, I would like to mention one important point that concerns not only the honesty in evidence portion of H.R. 10 but all of those key provisions that will serve to improve how justice is rendered in the federal courts. My basic point begins with a common sense observation that if plaintiff's lawyers can wrongfully circumvent federal court jurisdiction, all of these reforms will have little or no value.

Unfortunately, fraudulent or inappropriate circumvention of federal court jurisdiction in diversity of citizenship cases goes on today. I will submit to this Committee a brief that describes this practice. In order to avoid diversity of citizenship cases, plaintiff's lawyers will often name a local retailer or wholesaler or even an employee of a company solely to break "diversity of citizenship." The plaintiff's lawyer has absolutely no intent of enforcing any judgment against these defendants. Nevertheless, they are put through very substantial legal costs, waste of time that could be used in productive activities, plus the embarrassment of being named in a lawsuit.

My concern is that with Common Sense Legal Reforms implemented in the federal courts, this trend will be exacerbated. Working with experts in litigation, I would like to submit to the Committee a proposed amendment to Title 28 of the United States Code that would put an end to fraudulent and inappropriate joinder. It will help assure that good reforms such as contained in Section 102 of H.R. 10 will, in fact, be meaningful and helpful as a practical matter.

Today, the practice of naming nominal defendants is brought about, in substantial part, because plaintiff's lawyers believe that they will get an advantage by suing an out-of-state corporation in a state court. The fact that such an advantage is a real one has been recognized by scholars and even by judges of state supreme courts. See *Blankenship v. General Motors Corp.*, 406 S.E. 2d 781 (W.Va. 1991).

Mr. MOORHEAD. Thank you.

Mr. Roisman.

**STATEMENT OF ANTHONY Z. ROISMAN, COUNSEL, COHEN,
MILSTEIN, HANSFELD & TOLL, WASHINGTON, DC**

Mr. ROISMAN. Thank you, Mr. Chairman. It's a pleasure to be here.

I've practiced law in Washington for slightly more than 30 years and have become a proponent of term limits on Washington lawyers. I'm approaching my limit and was fearful that I might never have the opportunity to testify before a committee chaired by Republicans. So thank you for giving me this opportunity before my term limit expires and I leave the Washington law practice.

The issue that the committee is looking at today involves, I think, a very critical question. The public participates directly in our republican form of government in two ways primarily. They vote at the ballot box and they vote in the jury room. Congress should be extremely reluctant to restrict either of those processes by which the public participates in our society.

More and more, people are alienated from government because they feel that government is being taken away from them and turned over to government officials. Section 102 is essentially a

piece of legislation to take away from the jury the responsibility of deciding right and wrong, scientific truth and scientific falsity, and putting it in the hands of a handful of appointed lifetime government officials. I submit to you that before that's done, before that change is taken, the Congress should be confident that there is reliable scientific evidence that that's necessary. The record does not support that conclusion.

First, in the republican form of government that we have, one of its great strengths is the ability of people to have their disputes resolved, and resolved in a way that is civilizing. If you consider the kinds of cases that are the focus of the expert testimony that, for instance, Mr. Charrow is talking about, the issues could not be more heated and more emotional: A mother who believes her child was killed as a result of the negligence of some large corporation; a family whose father was the victim of government-funded radiation experiment. It is remarkable to me that people in this society go to their lawyer, and not to their gun dealer, when those sorts of things happen. Isn't that an amazing thing?

And it's extremely important for the fabric of this society to remain together that when those disputes are not otherwise resolvable, there's a place to go where people have faith in the system. That system is a civil justice system with a strong preference for trial by jury. This was an element of the Declaration of Independence. One of the things that King George had done was to restrict the right to trial by jury. And the public expects that it will have that opportunity. Section 102 challenges it.

What evidence exists to support the proposition that we have a crisis? I completely agree with Dr. Zweig's testimony on that issue. There is none. Mr. Charrow has given us an excellent example of what the problem is. He has given us interesting anecdotes: the advertising page of a single journal publication used to try to draw the general conclusion that all experts are somehow or another charlatans; a study of 25 jurors conducted in Baltimore to draw the conclusion that jurors are not capable of understanding scientific evidence or learning from it; and another one showing with, I think—and correct me if I'm wrong, Mr. Charrow—8, 10, 12 people looking at a video and reaching a conclusion about whether a barn was present or not.

That kind of reasoning by anecdote is precisely the kind of scientific reasoning that is rejectable, and should be rejected, in any court in the country. Under the Supreme Court's decision in *Daubert* and under the existing rule 702, it would be rejected. Congress shouldn't accept anything less than what it would demand the courts have. If you merely apply the *Daubert* standards for admissibility of evidence to the record in support of section 102, you will conclude the evidence is inadmissible; the section is not proven to be necessary.

Third, again, I agree with Dr. Zweig. I think if section 102 were enacted, it would be a mischievous provision. It would be a wonderful lawyers' full employment act for lawyers paid by the hour who will litigate for the next 10 years over whether or not Congress was codifying the *Daubert* opinion, narrowing it, broadening it, modifying it. Why would you need to codify an opinion of the U.S. Supreme Court whose opinions are binding on all of the Federal

courts in the United States? And in attempting to codify it and trying to digest its multipage opinion into a few words and a few paragraphs in a section, you're bound to create the kind of cracks and crevices that make lawyers salivate. Don't do it. If the U.S. Supreme Court, nine to nothing, has already spoken on the subject, why would you want to speak again on the same subject in slightly different words?

In addition, what this section will do is provide a major modification from the *Daubert* opinion by, as Dr. Zweig has pointed out, shifting the burden from the proponent of excluding the evidence to the proponent of the evidence. That's a doctrine which is embedded in the Federal Rules of Evidence and has been part of the evidentiary standards used by the Federal courts for decades.

Today I heard for the first time that Judge Winter, who chairs the authoritative judicial panel, established by the Administrative Conference of the U.S. Courts to address the issues of the Federal Rules of Evidence, and his panel unanimously said, "Please, Congress, don't do this. We're in the process of studying the very same topic." If science is to govern decisionmaking—and it should—who would want to move ahead with a decision while the chief scientists, these judges, are still in the process of studying the problem?

Finally, in conclusion, what section 102 seeks to do is to centralize the dispute resolution process in a handful of lifetime-appointed Federal employees and take it away from the American public. I don't think the American public wants that to happen. I don't think there's any evidence that they are trying to give up their role in making these sorts of decisions and sitting as jurors.

Unless and until the American public indicates some willingness to do that or a desire, unless there's some evidence from the judiciary themselves that they think that they need more powers to control scientific evidence than they now have, unless there's some evidence that the judicial system is somehow or another failing to achieve its primary goal of efficiently resolving disputes between citizens, Congress should not step in. Congress should leave well enough alone.

Thank you.

[The prepared statement of Mr. Roisman follows:]

PREPARED STATEMENT OF ANTHONY Z. ROISMAN, COUNSEL, COHEN, MILSTEIN, HANSFELD & TOLL, WASHINGTON, DC

Thank you Mr. Chairman. I very much appreciate this opportunity to address the Subcommittee on the topic of civil justice reform. My remarks will be limited to offering my views on Section 102 (Honesty in Evidence) of the proposed legislation.

One of the hallmarks of the American form of democratic government is the existence of a mechanism for resolution of disputes among citizens. That mechanism, our civil justice system, is rooted in two principles. First that every disputant is given a fair opportunity to present their side of a dispute. Second, that the dispute is resolved with a trial by jury. These twin principles are the key to public acceptance of the civil justice system for dispute resolution. Once the public loses faith in that system they will inevitably turn to other, less acceptable and vastly more disruptive ways of resolving their disputes. With this thought in mind the Supreme Court wrote in 1907:

The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the

citizens of all other States to the precise extent that it is allowed to its own citizens.¹

The central importance of the trial by jury cannot be overstated. The Chief Justice of the Supreme Court, William Rehnquist wrote:

. . . The founders of our nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign. . . . [Their] concerns for the institution of jury trial . . . led to the passage of the Declaration of Independence and to the Seventh Amendment. . . . Trial by a jury of laymen . . . was important to the founders because juries represented the layman's common sense . . . and thus keep the administration of law in accord with the wishes and feelings of the community.²

As Chief Justice Rehnquist noted, among the grievances spelled out in the Declaration of Independence was the deprivation "in many cases, of the benefits of trial by jury." And John Dickinson, one of the leading Federalists, wrote "Trial by jury is our birthright; . . . who in opposition to the genius of United America, shall dare to attempt its subversion."

It is against this background of commitment to the role of the civil justice system and the jury in resolving disputes, that Congress enacted Rule 702 of the Federal Rules of Civil Procedure. As the Supreme Court recently held in the *Daubert* case, the basic standard of evidence in federal courts is to favor admissibility and, as a leading commentator has concluded, the burden is on the proponent of exclusion of evidence to demonstrate that the evidence is not admissible.³ The Supreme Court went out of its way to emphasize that "[v]igorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."

An examination of proposed Section 102 reveals that the intent of the provision is to restrict the extent to which juries resolve disputes among experts and transfer that function more into the hands of judges. Given the strong theme imbedded in the history of the United States and the common law favoring the resolution of disputes by juries rather than judges and by courts in general rather than without judicial process, any proposal to shift the balance toward removing disputes from resolution by a jury should be carefully scrutinized and compelling evidence should be presented to justify any such restriction on the right to a trial by jury.

There is not, to my knowledge, any scientifically reliable evidence that there is a problem in our court system with the admission of expert opinions which are without merit or that juries are accepting scientific positions which are demonstrably in error. Before Congress seeks to alter almost 25 years of experience with Rule 702, it should have presented to it strong, scientifically reliable evidence of a problem which needs a solution. Of course there are anecdotes of isolated cases here and there where it may appear that an injustice has been done, but reasoning to a general conclusion about the entire system from such isolated examples would be totally unscientific. In addition, there are ample examples of federal judges, even appellate courts, who have gotten the science very wrong.

For instance, Judge Weinstein once rejected any evidence of a causal connection between a chemical exposure and cancer based upon studies of animals. He concluded that animal studies were irrelevant to human health because "they involve different biological species."⁴ That "scientific" conclusion directly contradicts findings by the Office of Technology Assessment which concluded in 1987 that:

All policies accept the use of animal data as predictive for human beings. Explicitly or implicitly, all the policies acknowledge that substances shown to be carcinogenic in animals should be presumed to present a carcinogenic hazard to humans.⁵

Several years later the United States Court of Appeals for the Fifth Circuit declared that a causal connection could not be made between a drug and a birth defect unless there was statistically significant "epidemiologic evidence (studies in humans) which demonstrated such a connection existed."⁶ Another group of equally distinguished appellate judges from the Third Circuit Court of Appeals came to the opposite conclusion reasoning that experts were free to rely on any scientific data, including statistically insignificant epidemiologic data, in reaching their conclusions about causation.⁷ This latter view also is consistent with the views of the National Research Council of the National Academy of Sciences.⁸

These judicial examples are not intended to argue for changing Rule 702 to further reduce the role of the judiciary in preliminarily screening scientific evidence for admissibility, but merely to illustrate that mistakes can be made by judges as well

as juries. Of course, the jury mistake only effects the one case, but the judicial opinion may be repeated by other judges and become accepted as a valid pronouncement of science. Such a multiplier effect of judicial mistakes is another reason why the Congress should be particularly reluctant to increase judicial power at the expense of the jury process. It underscores the reason why Congress should not take away from the people their ability to resolve disputes and should not hastily decide that it is better to centralize the decision-making process in the hands of a few appointed government officials. This Nation was founded on a supreme confidence in the wisdom of the people. Legislation like Section 102 directly challenges that principle. If Section 102 were adopted Congress would be declaring that the people of the United States, sitting as jurors, do not have the wisdom to decide right and wrong and do not have the wisdom to distinguish between sound science and bogus science. There is no scientifically reliable evidence to support that revolutionary proposition.

Thus, a starting point in analyzing Section 102 must be whether and to what extent the proposed changes to Rule 702 will be contrary to basic principles upon which our civil justice system is based and to what extent the proposed changes will be contrary to the intended goal of the Federal Rules of Evidence. Applying this analysis to the proposed Section 102 demonstrates that it will severely impinge on the opportunity for disputants to have their controversies resolved by civil juries and will have the effect of forcing those disputants to resolve their disputes outside the civilizing confines of a courthouse. It will also cause substantial disruption and confusion within the Federal Rules of Evidence and will reverse the long-standing presumption in favor of admissibility of testimony and reliance upon the skill of the adversaries and the jury system to resolve conflicting scientific opinions.

Another problem with proposed Section 102 is that it will cause substantial confusing in the judicial process, thereby wasting limited judicial resources on resolving conflicts over the meaning of new language in Rule 702 and substantially delaying the resolution of cases in the federal courts. First, subsection 102(b)(1) represents an attempt to restate what the Supreme Court has already stated in the *Daubert* case. Which language should govern the decisions in future cases—the truncated statement of the rule formulated in proposed Section 102 or the language as it appears in the Supreme Court opinion and as it has been interpreted by dozens of federal courts since that opinion? The Supreme Court developed a multi-step process for determining admissibility which focussed on relevance, methodology and reasoning. Now Section 102(b)(1) appears to compress all of that into a test of reasoning. The general rule should be that “if it’s not broken, don’t fix it.” In this case the Supreme Court has spoken on the subject. Congress, at least in this provision, does not appear to be rejecting what the Supreme Court has done. Congress should leave well-enough alone.

Second, proposed Section 102(b)(2) places into Rule 702 a modification to principles already established in Rule 403 without changing Rule 403 or explaining how it should be reconciled with the language in Rule 702. This will create no end of confusion and extra litigation as courts struggle to determine what is meant by these two contradictory provisions. Rule 403 provides that even relevant evidence may be rejected if its probative value is substantially out-weighted by the danger of unfair prejudice. Now proposed Section 102 indicates that for Rule 702 the evidence is to be rejected unless its reliability out-weighs the prejudice. This not only reverses the presumption of admissibility which has been the foundation of the Federal Rules of Evidence for almost 25 years, but creates a morass of legal problems for the courts to resolve. For example, does proposed Section 102(b)(2) create a presumption that all expert testimony is inherently prejudicial? What is the basis of such presumption? Since the proposed section references all of the factors contained in Rule 403, is the court compelled to consider in every case whether the use of the expert testimony involves the needless presentation of cumulative evidence, undue delay and confusion of the issues, all of which are factors in Rule 403? Again, what reason exists for this change? Where is the scientific evidence that expert opinions which are being admitted in evidence in federal cases are creating the problems envisioned in Rule 403? Without such evidence there is no basis for Congress to be amending either Rule 702 or Rule 403.

Third, subsection (c) of proposed Section 102 addresses a non-issue. I am unaware of any wide-spread use, or even any use, of experts whose compensation is dependent upon the outcome of the case. As a matter of strategy lawyers do not use such experts because such an arrangement would raise questions about the credibility of the witness. However, if Congress makes this a statutory standard, it will become another basis for lawyers to attempt to get judges to apply a legal standard to exclude experts from testifying. In such an event lawyers will come up with many clever ways of attempting to show that a witness’s compensation is dependent upon the outcome of the case. For example, lawyers will inquire of their opposing counsel

whether, if the case is lost, the lawyers will continue to use the same expert. If the answer is no, is the expert then excluded under Section 102(c)? What if the expert is doing research work for the party calling him? Will that party have to assure the Court that regardless of the outcome of the case the expert will continue to be retained to do such research in order to avoid the reach of this new provision? How much will the lawyers for the other party be able to probe into this issue during the discovery phase of the case?

Fourth, there is a minor point which relates to the title of Section 102. Frequently courts will look at the title of a section to determine its meaning. Proposed Section 102 is entitled "Honesty in Evidence" but, with the possible exception of subsection (c), it has nothing to do with honesty in evidence. Under this proposed Section, and the existing Rules of Evidence, dishonest experts, who follow appropriate procedures and methodology, are permitted to testify and honest experts who do not follow such procedures and methodologies can be excluded. The legal system has other mechanisms to deal with lying. Rule 702 is not one of them and proposed Section 102 will not change that.

Finally, proposed Section 102 will, if enacted, result in greatly increasing the workload of the federal courts with no discernible benefit to the litigants or the system. By shifting the focus of the challenge to expert testimony from the jury, who must weigh scientific and other evidence and determine which to believe, to the judge, the Section will result in substantial additional burdens on the courts. First, every litigant who wants to attack the opinion of the opposing experts will be encouraged to use these new provisions and their interpretations of them to get what is essentially a free shot at the opposing experts. Losing a Rule 702 dispute does not mean losing the case it only means you have to take the fight to the jury. This will certainly embolden any lawyer who is being paid by the hour to take a free crack at the experts of their opponents, confident that even if they lose they still get to take their case to the jury. These Rule 702 hearings can last days or even weeks and can result in appeals, remands and second appeals.⁹ In her Minnesota Law Review Article, Professor Berger cautioned against allowing the pre-trial procedure to be turned into a time-wasting process which will bog down the federal courts in issues better left to resolution by the jury.¹⁰

In conclusion, proposed Section 102 runs contrary to basic principles which are vitally important to our civil justice system and to the goals of the American public. First, it centralizes power in the federal bureaucracy by shifting the focus of decisions from the public, functioning as jurors, to a handful of government officials appointed for life. Second, it reverses the underlying premise of the Federal Rules of Evidence that, absent some strong evidence to the contrary, all relevant evidence should be heard by the jury who will make the final decision in the case. Third, it adds confusion to the federal courts thereby increasing the work of federal judges and slowing down the process of resolving disputes. Finally, there is no scientifically reliable evidence to support the changes proposed in Section 102. If, the Congress is to be properly concerned that decisions in individual cases in federal courts should be based upon reliable scientific evidence, then Congress should itself insist that reliable scientific evidence support any major changes in the civil justice system, particularly where the effect of those changes is to narrow the constitutionally protected right to trial by jury.

Thank you.

FOOTNOTES

1. *Chambers v. Baltimore and Ohio Railroad Company*, 207 U.S. 142, 148 (1907).
2. *Parklane Hosiery Co. v. Shore*, (dissent) 439 U.S. 322, 337, 340, 343-344 (1979).
3. *Daubert v. Merrell Dow*, 125 L. Ed. 469, 479 (1993) and *Procedural Paradigms for Applying the Daubert Test*, Berger, 78 Minn. L.R. 1345, 1365, 1373 (1994)
4. *In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1223, 1241 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied sub nom. Lombardi v. Dow Chem. Co.*, 487 U.S. 1234 (1988).
5. *Identifying and Regulating Carcinogens: A Background Paper*, Congress U.S., OTA, November, 1987.
6. *Brook v. Merrell Dow*, 874 F.2d 307, (5th Cir.), *modified*, 884 F.2d 166 (5th Cir. 1989), *cert. denied*, 494 U.S. 1046 (1990).
7. *Paoli*, 916 F.2d at 857, 862; *DeLuca*, 911 F.2d at 953-54.
8. *Environmental Epidemiology, Public Health and Hazardous Wastes*, National Research Council, 27-42 (1991).
9. In this regard see the lengthy history of *In re: Paoli Railroad Yard PCB Litigation* as set forth in the two volume, 155 page opinion of the United States Court of Appeals for Third Circuit, (No. 92-1995, decided August 31, 1994) which was de-

ciding its second appeal of the District Court's decisions regarding the admissibility of expert opinions. In that case the District Court held two separate hearings on the admissibility of expert testimony, the second of which consumed five days of hearing time.

10. See fn. 3 *supra*.

Mr. MOORHEAD. Well, thank you very much. We'll now begin a round of questions for the witnesses.

I have a question herefor Dr. Zweig. Section 102 of H.R. 10 seeks to adopt the standards established in the *Daubert* case used by Federal judges to consider scientific evidence, but the rule changes the presumption under which such evidence may be considered. Under this new rule, scientific evidence would be presumed inadmissible unless it can be shown that it's based on valid scientific reasoning and it's relevant to the case, instead of being presumed admissible if these factors are present. In your opinion, will this work to arrest the admissibility of evidence based on what is commonly known as junk science?

Mr. ZWEIG. Mr. Chairman, could you repeat just the last part? Would it work to arrest—

Mr. MOORHEAD. In your opinion, will this work to arrest the admissibility of evidence based on what is commonly known as junk science?

Mr. ZWEIG. It probably would, Mr. Chairman. It would probably arrest all scientific evidence at the outset of each individual case, and if it's Congress' policy choice to shut the faucet off to its merest trickle, I think that that will be accomplished by this provision.

There's a problem involved with the inadmissibility provision, however. It is difficult for courts to determine what is scientific evidence and who is a scientific witness against the entire range of experts testifying in cases. That issue may be illustrated by a development in the health care field called clinical practice guidelines. Clinical practice guidelines are prescriptions developed from the scientific literature to which is added clinical expertise and published by the Federal Government and the governments of the States, and by several hundred professional societies. They are thought to result in better health care. But if they were introduced by an expert—at the current time our physicians are considered to be scientists in many forums—would the Federal judge be required to qualify them as a scientific expert or as a healing expert? Apparently, by the terms of section 102, the physician would be required to testify under burden of presumed inadmissibility and a search for scientific reasoning. Others might also be in these new evidence-driven areas, it will be hard for the courts, and very important strategic planning for the litigators, to determine how they're going to bring a case.

Mr. MOORHEAD. You know, it's been a long time since I've tried a court case because I've been in Congress for a long time, but I know there's very few fields of life in which you can't find people that are totally out of step with everybody else, whose ideas of what's scientific is certainly contrary to what their entire profession believes in. Many of these people are extremely articulate, convincing.

Mr. ZWEIG. Even intimidating sometimes.

Mr. MOORHEAD. Even intimidating on occasion.

Most jurors are just not trained to distinguish between what is generally considered the scientific approach, the correct method of healing, or whatever it may be, and I'm not saying these people are always wrong because perhaps some of them are right, but I don't know whether it should be the judge's prerogative to pick those things that are so far out of line with everything else and say, well, perhaps this is junk science, just a scheme. Maybe it's some machine that someone's developed that could cure every ailment.

I don't know—I agree with Mr. Roisman that the jury is the body that determines the fact, but whether they're capable of doing that in all these cases, whether their decision is based upon emotion, upon being sold a bill of goods, or whatever it may be, by someone that sounds very scientific, but really is not, is something else. But I just wonder what you think about that.

Mr. ZWEIG. I think that can definitely be a problem. When you talk to judges informally, many of them think that is a problem. With the growth of knowledge and the expansion of the expert witness industry, judges in my experience feel that controlling the testimony could possibly be a problem, and I think that a letter that the subcommittee received from Judge Schwarzer sets out some judges' views more systematically.

There are a couple of remedies in addition to *Daubert*, I think *Daubert* can be an important remedy. *Daubert*'s only a little over a year old. It requires judges to make certain that the evidence introduced is scientific knowledge, and valid scientific knowledge; that is, that the products are the result of scientific inquiry, testing methods, peer review, discipling acceptance, and techniques used to prove the proposition. *Daubert* can help to render more accountable expert witness testimony, and I think you have put your finger on a problem that bothers judges.

There are a few other possibilities. One is jury background briefings by nonparty experts to scope out the roadmap, the scientific directors to which testimony will be made by party-based witnesses in trials.

A second safeguard is the use in Federal courts of rule 706, which authorizes expert witnesses to be appointed as the court's witnesses. The remedy has not been used widely, in part because judges worry that an expert coming before a jury with the judge's endorsement will tilt the proceedings. Several efforts are being lauded, including those of the Einstein Institute, to determine how much of expanding the courts' witness effort might be useful in complex scientific cases.

The issue you have raised is correct, Mr. Chairman; the question is: Would interposing a presumption of an inadmissibility be the right remedy?

Mr. MOORHEAD. Well, thank you.

Mr. Charrow, in your opinion, will the term "scientifically valid reasoning" be interpreted different from the standard of based on scientific methodology already established by the Supreme Court in the *Daubert* case to apply to the admission of expert scientific testimony? If not, would replacement of the term "reasoning" with the word "research" or "methodology" come closer to the standard established by *Daubert*?

Mr. CHARROW. As I understand the question, you're interested in the difference between—if there is one—between scientific reasoning, as used in the *Daubert* opinion, and scientific techniques or methodology. I think there is a difference, and I think the bill, in my estimation, goes to that difference.

The techniques that a scientist uses would be the methods used to collect data, the very limited conclusions drawn from those data. The opinion, on the other hand, would be a legal opinion rendered in a legal setting in court, usually about the ultimate question of fact that the jury is asked to decide. So I think the two are very different.

Mr. MOORHEAD. Mr. Roisman, this is a long question. So—I know this is a kind of a technical area, and I want to apologize in advance for the length of the question.

Mr. ROISMAN. OK.

Mr. MOORHEAD. But many complain that plaintiff's trial lawyers seeking high verdicts have it both ways right now. If a scientific theory which supports their case is based on sound research, and is generally accepted as supporting the proposition, an attorney can and will use that aspect of it to influence a jury. If, however, general scientific thought does not support a proposition, that same attorney can find a fringe expert to testify on a scientific theory which supports his case, as long as the testimony is based on scientific research bearing out a desired result. So in many people's opinion, the system is broke and needs to be fixed. Our job is to insure that, because of its scientific and complicated nature, and its ability to prejudice, only valid testimony be used for consideration by a layperson who must ultimately decide a plaintiff's case. A presumption of inadmissibility would require a judge to keep out the fringe evidence unless it meets the standards *Daubert* emphasizes. Now why isn't that fair?

Mr. ROISMAN. OK, I think I followed the question.

First of all, it isn't fair because what it's doing is presupposing a set of facts. Mr. Charrow talked about hypothetical questions. It's the essence of a hypothetical question. It presupposes a set of facts for which there is no valid scientific evidence to support it.

One, the phenomenon that you describe—that is, lawyers using an expert who supports their position, even if they're at the fringe—is not an industry uniquely associated with plaintiffs. You may be aware that there are defendants arguing in courts today that a substance such as benzene, which is known to cause leukemia, doesn't cause leukemia. The National Academy of Sciences, the Environmental Protection Agency, the Occupational Safety and Health Administration, the National Cancer Institute all say that it does. So the idea that you might find someone who disagrees with that is not unique to plaintiffs or defendants. That's the first point.

The second point is that if the opinion which is contrary to, let's say, the wide majority of views is scientifically reliable, if it in the words of this statute, "based on valid reasoning," or as the Supreme Court in *Daubert* said, "valid reasoning and appropriate scientific methodology," why shouldn't it be able to be presented in a court of law as a reasonable dispute to be resolved by the jury, the same as the jury would resolve the dispute was the light red or

green when the car went through the intersection. It's an issue that is in part the essence of the dispute. So that's the second part of this.

The third part is, to the extent that the expert opinion is really beyond the pale, anything that you or I or anyone would agree shouldn't be presented in the courts, there is nothing to suggest that *Daubert* as written doesn't adequately deal with that problem. But if you create a presumption against that expert, then, as Dr. Zweig said in answering your earlier question, what you will end up doing is excluding both the reliable and scientifically valid opinion and the junk opinion by putting a burden of proof there that doesn't currently exist.

As Congresswoman Schroeder mentioned in her opening statement, that presumption will not only apply in civil cases; it will apply to prosecutors introducing evidence of DNA typing, fingerprint experts, forensic experts in general. It will apply across the board.

Now there ought to be a very good reason why we would shift this burden the other way. Now that reason would be that we have something to gain or some need to have these disputes not be resolved by the jury because the net effect of taking the experts out of the cases is not to leave the case and the court without experts; it's to remove the case from the court, because without the expert, the layperson witness cannot testify whether or not exposure to a toxic chemical is responsible for a particular person's disease. A layperson cannot testify whether or not the DNA from a particular blood sample found at a crime scene matches the DNA of the defendant in the case.

So if you take the expert out of all the cases, which is what you tend toward with section 102, you take the disputes out of the court's resolution. Does that make the dispute go away? No, it merely limits the number of options available to resolve the dispute. If you can't go to a court and get your dispute resolved, where will you go? And every study suggests that the places that society goes when they cannot resolve their disputes in a civilizing way is uncivilized.

I would point particularly to the opinions that were pronounced by a joint panel of the American Bar Association and the Brookings Institution in a report in 1992 entitled, "The Brookings Institution Charting a Future for the Civil Jury System," which concluded with five points why the jury system should be preserved and said this:

"Finally, the jury system provides a means for legitimizing the outcome of dispute resolution and facilitating public understanding, and support for, and confidence in our legal system."

Mr. MOORHEAD. We're going to have to research until—to recess until—talking about research—until at least one or two of our Members get back who already went over to vote. We've got about 6 or 7 minutes left before the vote concludes, and we have to go over there or we'll miss it. I think they will begin the questioning again as soon as they get back.

[Recess.]

Mr. GEKAS [presiding]. By the authority vested in my by the chairman, this subcommittee is now reconvened. We will call the

committee to order and begin the process of rendering questions to the panel.

I will yield to myself such time as I might consume, and that may be until 4 o'clock.

[Laughter.]

Mr. GEKAS. Mr. Roisman, first, if I may, you feel that it's an exercise in futility for the Congress to codify the *Daubert* decision, which is, after all, in your version—and I agree—the law of the land, as it were. Is there any justification for codifying, nevertheless, on the basis of, one, the court could change its mind; there might be some case that would come up that the Supreme Court would not invalidate *Daubert* but severely modify it, contrary to what the prevailing thought is now in the Congress; other factors that might occur? Is that a valid concern on my part? If I feel strongly as a legislator that *Daubert* is correct, and now see an opportunity to put it in concrete, as it were, for my purposes, should I not venture into doing that, knowing that, just like the viscidities of anything else that the Supreme Court has done over 200 years, that that could change and *Daubert* could become the son of *Daubert* or the grandson of *Daubert*, and then we wouldn't know where we were on that reasoning?

Mr. ROISMAN. Conceptually, I would have to agree with you that if you felt that the process was subject to very rapid modification by the Supreme Court, that you might want to codify, but I think there are two reasons why that would not be supportive of section 102.

No. 1, this legislation does not codify *Daubert*. In order to codify *Daubert*, what you do is you write a section that says the Congress of the United States hereby codifies *Daubert*, and that's it; it's done and it's set.

When you start to write a very truncated version of what *Daubert* means, you inevitably create a shadow of, or son of, *Daubert*, another something for the courts to try to figure out, well, what does this language mean? Your words in section 102 are not the exact words of the Supreme Court. In fact, even if we looked only at section 102(b)(1), the Supreme Court's description of what is the scope of the investigation to be conducted by a Federal court talks about methodology, reasoning, reliability, and relevance. All of those are part of the Supreme Court opinion and, arguably, what you're doing, at least in section 102(b)(1), is narrowing the inquiry by the courts rather than codifying the full range. What the Supreme Court was saying, what they were walking away from when they rejected the *Fry* test was we don't want to make this a one-shot, simple, yes-no test because science is too complicated for that. We want to give the Federal courts the flexibility and here are the factors that they should be thinking about.

So my first point would be section 102 is not codifying it at all, even in 102(b)(1); 102(b)(2) is clearly not codifying it because the Supreme Court makes clear in its opinion that the current law is that the presumption is in favor of admissibility, and section 102(b)(2) reverses that presumption and makes the presumption against admissibility.

But—

Mr. GEKAS. Then I'm confused. If we're not codifying—if we're codifying *Daubert*, in one sense you're saying it's an exercise in futility. Now you give me the rationale for saying that what we would do in attempting to reflect *Daubert*, not codify it, we're engaging in creating new law, and, therefore, if that's the wisdom of the Congress even to narrow it—let's say that that's the consequence of it—we are not codifying *Daubert*, but looking at *Daubert*, using it as a foundation or as a touch point, and creating new law, not codifying *Daubert*. Which is it? Are we?

First of all, you didn't—you said don't do it because it's already the law.

Mr. ROISMAN. I was saying—

Mr. GEKAS. Then you tell us that there is enough difference in it that it would justify, if we felt those differences were valid, to go ahead and insert it into the law.

Mr. ROISMAN. That's correct. I don't think what I'm saying is inconsistent. One of the arguments for 102 that's been advanced is it merely codifies *Daubert*. So I am saying that's not true. I don't think it does.

Mr. GEKAS. All right. Now we have—

Mr. ROISMAN. But the second argument is, OK, forget about whether it codifies *Daubert*; does it improve on *Daubert*? Does it make for a better situation? And on that issue, I say no because I don't think there's any justification to further restrict the admissibility of expert testimony. There is nothing to suggest that the *Daubert* test, which in some courts was already being used before *Daubert*, notably in the third circuit, to some extent in some of the other circuits, that we've got a problem, that there's a lot of—or even any significant science going to the juries which the juries end up misunderstanding, misconstruing, or handling wrong.

But, most importantly—and a point that I wanted to add even in answer to your first question, which is why shouldn't we do this—is you now have the experts in the United States who are the closest to this issue evaluating this question, the Committee on Rules of Practice and Procedure, the Judicial Conference of the United States, Judge Winter's letter that's now in the record of this proceeding which says that they unanimously ask the Congress: "Do not add section 102 now because they're just in the process of evaluating *Daubert* and its impact?" Does it solve a problem that needs to be solved? Should the Committee come to Congress with a modification of 702 in light of *Daubert*, including, I guess, should Congress codify it? Should Congress actually change the language of 702 so that it is never subject to any interpretation other than *Daubert*.

In the face of all of that, it seems to me that Congress should not. I mean, you've got an important piece of legislation here in this total H.R. 10 bill. It has a lot of provisions in it. I can't say that I'm a supporter of very many of them, but that's neither here nor there. That piece of legislation is dealing with issues that are not currently the subject of the Judicial Conference's study. They are not the subject of something the Supreme Court of the United States acted on less than 2 years ago. They are not without some evidence to suggest that maybe there's a problem that ought to be addressed.

And here's one that is: Why hold up, drag down, take or interfere with your overall legislative objective by proceeding in the face of unanimous opposition from the members of the appropriate committee of the Judicial Conference? I say you shouldn't do it. Put it aside.

Mr. GEKAS. Are you saying that one of the results that the Conference could predict would be a recommendation to the Congress that they do codify *Daubert*?

Mr. ROISMAN. Sure. It could be anything. They could do that. They—

Mr. GEKAS. Then there's really nothing wrong with Congress codifying a Supreme Court decision based on some of the rationale which I offered in my question to you?

Mr. ROISMAN. No, and I started by saying that, if that's what you wanted to do, there isn't anything inherently wrong with it, but why—what if this committee comes back and says, "No, don't codify *Daubert*. We've found after more careful study, two flaws in it that will fail to accomplish the goals that *Daubert* wanted, and here's how rule 702 should be written to deal with that?"

Mr. GEKAS. Then we can revisit it, can we not?

Mr. ROISMAN. Of course, you can, but why—why make the mistake—

Mr. GEKAS. In the meantime, they have the right to vote against this in our respective districts is the point.

Mr. ROISMAN. Well, of course. The Congress has absolute power to pass any piece of legislation that it wants, and I'm not quarreling with that. I'm quarreling with whether you ought to exercise that power—

Mr. GEKAS. You're saying if we feel that the law of the land, as you feel, is the *Daubert* decision, and we take steps to codify it, along with some other variations, 80 percent modify it or wholesale modify it, whatever we—the final product reflects, isn't it absolutely the thing to do if we feel strongly about it, knowing that the Judicial Conference may in 2 years come back and say to us, "Please, why don't you change it by removing that one comma and inserting the word 'indirect,'" or some other fancy that they come up with? Is that bad policy on our part?

Mr. ROISMAN. It's bad policy to perceive that section 102 is codifying *Daubert*; it's not.

Mr. GEKAS. Pardon me?

Mr. ROISMAN. Section 102 is not codifying *Daubert*. If that's all that was to be accomplished, there is a way to write the section to do that.

Mr. GEKAS. Well, does *Daubert* use "scientifically valid reasoning" in the phraseology?

Mr. ROISMAN. It's one of the phrases in the opinion.

Mr. GEKAS. Reliability on the probative value of evidence?

Mr. ROISMAN. No, it doesn't use—sufficiently reliable so that the probative value of such evidence outweighs the danger specified in rule 403—it doesn't use that phrase.

Mr. GEKAS. In what way does it, does that phrase diverge from *Daubert*?

Mr. ROISMAN. By shifting the burden on the admissibility of expert testimony from the assumption that it is admissible unless

shown that it should not be admitted. What it really—the current *Daubert*, the current rules 702 and 403, as written in the Federal Rules of Evidence, put the burden on the party wishing to exclude the evidence to come forward with a prima facie case that the evidence is inadmissible, and the burden remains on the party wishing the evidence in to show that they meet the test, but the way the test is framed is that you must substantially outweigh the probative value by the prejudices referred to in rule 403 to reject the expert. Congress is reversing that.

Mr. GEKAS. But that would all be litigated, would it not, in a pre-trial proceeding, as I would view it, where the contrary view by the opponent would also be viable; is that correct?

Mr. ROISMAN. Oh, sure, it would be done under a 104 hearing under—

Mr. GEKAS. Yes.

Mr. ROISMAN [continuing]. Federal Rules of Evidence.

Mr. GEKAS. So then what—aren't the protections there? Under our theory of shifting the burden, aren't the main protections still extant?

Mr. ROISMAN. No. No, they're not still extant because—

Mr. GEKAS. Why?

Mr. ROISMAN. Well—

Mr. GEKAS. If we have—

Mr. ROISMAN. It's as though I were to tell you that this piece of legislation cannot be passed; Congress doesn't have the authority to pass this legislation until it is able to prove that the legislation will be more useful than harmful. If I told you that, you would say you've just taken away my power to act; you've made me meet a test I didn't have to meet before. You're telling the proponent of expert testimony, "I'm not going to let your experts testify unless you prove that the probative value of their evidence substantially outweighs the possibility of prejudice and the other factors that are in rule 403."

Mr. GEKAS. Are you opposed generally to the Congress ever acting to shift the burden of proof in any—at anytime on any case?

Mr. ROISMAN. No.

Mr. GEKAS. Oh, I see. So on this one—

Mr. ROISMAN. On this case, I don't think Congress has any basis for wanting to shift it.

Mr. GEKAS. I understand.

Mr. ROISMAN. I mean, that—my position is you don't have a scientifically reliable basis to believe that this solution is solving a problem. There's not a problem there for this solution to solve.

Mr. GEKAS. Then I'll just end my questioning of you by asking once again: if we took *Daubert*, whole cloth, as the Supreme Court has stated it, would you still object to our codifying it?

Mr. ROISMAN. I would for the reason that I think you would be much wiser to wait for Judge Winter's advisory committee to report its recommendations to you in the normal way in which you get proposed changes to the Federal Rules of Evidence.

Mr. GEKAS. I thank you.

Mr. MOORHEAD [presiding]. The gentleman from New York, Mr. Nadler, is recognized.

Mr. GEKAS. Well, wait. I'm sorry, I had one more question—one more question for Mr. Charrow. I had written a note here.

In the hypothetical that you gave about the one study, that there was only one study, and the expert relied on it, again, reverting to the process to the proceedings, we would have a pretrial, would we not?

Mr. CHARROW. Correct.

Mr. GEKAS. And there, wouldn't that be controverted? Wouldn't there be an expert on the other side who would point out that flaw, that there was only one study—

Mr. CHARROW. Correct. Correct. And under the bill as it's currently written, what could happen would be that the epidemiological evidence, the data, the published paper, that would come in under this bill. The only thing that this bill would exclude would be the ultimate opinion that the epidemiologist is trying to testify to, that chemical A caused disease B.

So this bill does not keep out science.

Mr. GEKAS. I understand.

And one for Dr. Zweig; you mentioned something and I didn't quite catch it. Did you intimate that you want to substitute the word "research" for "reasoning" in our proposed legislation?

Mr. ZWEIG. I didn't suggest or initiate that. I think that—may I respond in terms of the question—

Mr. GEKAS. Yes.

Mr. ZWEIG [continuing.] You raised about codifying *Daubert*?

Mr. GEKAS. Yes.

Mr. ZWEIG. *Daubert* is a big decision with a lot of instructions to judges. It shifts, in my view, the duty from a rule-of-thumb application of a rule to admissibility to a judicial duty to screen. Mr. Charrow called it "gatekeeping," but a judge must screen the evidence and assure its scientific reliability, which means its scientific validity under the terms of the *Daubert* decision.

Daubert uses the term "scientific reasoning," but it's within a context of scientific research, scientific knowledge, scientific facts. And if the Congress were to find that it wishes to add its weight to the witness' requirement to testify to scientific issues, "reasoning" by itself is insufficient.

It would seem to me to be more effective for Congress to incorporate *Daubert* basic underlying commands to the courts, including the four standards set forth in the decision by means of which judges may make findings about scientific reliability.

Mr. GEKAS. I have one question generally and then I'm through, Mr. Chairman. Thank you for letting me wield the gavel. I thought I could question forever, but you took the gavel back.

[Laughter.]

Mr. GEKAS. What if we decided to, bowing to the opponents of what we're trying to do here, to eliminate the quasi-modification—quasi-codification of *Daubert* that's contained in our language here and simply went to (c) and retained the disqualification section having to do with contingent compensation for witnesses? Are you in favor or not in favor of that, just a quick yes-or-no answer?

Mr. ROISMAN. No, I would oppose it. I've given reasons in my testimony and so has Judge Winter in his letter.

Mr. GEKAS. Judge Winter is swarming all over the place here.

Mr. ROISMAN. As well he should.

Mr. GEKAS. Mr. Charrow.

Mr. CHARROW. I think the provision in H.R. 10 as written is superb.

Mr. ZWEIG. I think there's no problem with it.

Mr. GEKAS. Thank you.

Mr. MOORHEAD. The gentleman from New York.

Mr. NADLER. Thank you.

Let me briefly ask Mr. Roisman to follow up, Why do you object to the disqualification provision if unaccompanied by the others?

Mr. ROISMAN. OK. I think, first of all, because it's unnecessary. There's nothing to indicate that we have a problem with this. Judge Winter in his letter points out—and it's consistent with my knowledge as well—that virtually nowhere does anyone ever offer a contingent-fee witness. In some States, in some courts disciplinary rules prohibit it. In other places, just common sense would tell you: don't put a witness on the witness stand who will have to answer the question that his opinion is based in part upon the realization that if the jury believes him, he'll get paid, and if they don't, he loses. I mean, that just—just common sense tells you that's not an issue.

Mr. NADLER. Would it be harmful to include that?

Mr. ROISMAN. Yes, absolutely.

Mr. NADLER. Why?

Mr. ROISMAN. It will be harmful for two reasons. First of all, because it will invite a whole new area of debate as to whether or not the expert is really operating on a contingent-fee basis or not. If the expert, as Judge Winter points out, is working for the defendant and testifies, is he a contingent-fee expert? Will the plaintiff in that case be free to inquire into the hiring and firing practices of the defendant in order to discover what has been your history of how long you've kept experts on your staff after their testimony was not accepted—

Mr. NADLER. OK.

Mr. ROISMAN [continuing]. Et cetera, et cetera. It's just—it's—

Mr. NADLER. OK.

Mr. ROISMAN [continuing]. Mischievous.

Mr. NADLER. Thank you.

Let me ask Dr. Zweig. Right now you have section 104 hearings. This legislation would shift the burden. Why we would want to shift the burden against scientific evidence is beyond me, but that's another question. But this would shift the burden so that you would now have to prove the admissibility of presumptively inadmissible testimony all the time. In your opinion, would this give rise to a great amount of additional pretrial litigation?

Mr. ZWEIG. I think it would create an endless number of hearings in addition to those which the courts currently experience.

Mr. NADLER. So the answer is yes?

Mr. ZWEIG. The answer is yes.

Mr. NADLER. And, therefore, great additional expense to both parties?

Mr. ZWEIG. I think we don't know how much expense would be, but there could be additional parties' expense, court's expense, and experts' expense.

Mr. NADLER. And would this give rise to a greater additional number of appeals because now the question of weight to be given of expert witnesses, testimony is basically before the jury, but now you're going to have a lot more decisions for the judge to make preliminarily, which after the trial could give you a lot of appeals as to whether the judge was correct in admitting or not admitting based on this?

Mr. ZWEIG. Well, I think that the system is structured to generate appeals, to challenge new law, and this would do it. What this does, Mr. Nadler, is to essentially modify rule 402 of the Federal Rules of Evidence, and I don't think that that modification would be taken lying down by the practicing bar, the trial bar.

Mr. NADLER. So, in other words, you'd have a lot more pretrial hearings and a lot more appeals.

Secondly, would this make it much more difficult, in your opinion, for the prosecution to use scientific evidence or DNA testimony, and so forth, or forensic evidence in criminal trials?

Mr. ZWEIG. Yes.

Mr. NADLER. So it would make it more difficult to convict defendants in criminal trials through the use of forensic evidence?

Mr. ZWEIG. I think forensic evidence would be challenged at every introduction as presumptively inadmissible.

Mr. NADLER. And you would have to then spend a lot of time and effort to rebut that presumption?

Mr. ZWEIG. If you could, but evidence technicians are not scientists. By and large, I'm not sure they'd be able to do what the court would ask them to do in applying either *Daubert* or scientific reasoning standards.

Mr. MOORHEAD. Would the gentleman yield for a second?

Mr. NADLER. Yes.

Mr. MOORHEAD. Criminal trials are exempted in this legislation now, this bill.

Mr. ZWEIG. They are?

Mr. MOORHEAD. Yes.

Mr. NADLER. In the redraft, not in this? I don't see—in this bill? I haven't seen it.

Mr. MOORHEAD. We're going to—we're making changes in it.

Mr. NADLER. Oh, they will be exempted in the redraft? Well, I'm glad to hear that that improvement is being made.

So, in other words, the redraft that we haven't seen yet will say that, presumably, scientific evidence—that if—Dr. Zweig, we're informed now that a redraft that we haven't seen yet will exempt criminal trials from this rule. So now you'll have different rules in criminal and civil trials, and would it then be fair to say that it will be much more difficult to introduce scientific evidence into civil than into criminal trials?

Mr. ZWEIG. Yes.

Mr. NADLER. Is there any reason, any scientific or other reason, why you should have different standards of admissibility of scientific evidence on the civil side and on the criminal side?

Mr. ZWEIG. It's a matter of policy. If the Congress should find and decide that the policy should differentiate, then the Congress is free to act.

Mr. NADLER. Say it again? I'm sorry?

Mr. ZWEIG. It's a policy choice, Congressman. If—you asked me, is there a reason for it——

Mr. NADLER. Is there a scientific reason why scientific testimony, why the same scientific testimony or evidence would be more reliable and probative in a civil trial than it would in a criminal trial?

Mr. ZWEIG. No, not from the evidence itself, but there is—there is the feeling in the land that junk science has been imported into the civil side, and I do not hear the same label sticking to the criminal side of the law.

Mr. NADLER. So assuming junk science exists and is a problem, if we were to amend this bill to exclude the criminal side, then the same evidence that in the civil trial would be labeled junk science and would not be admitted, that presumptively junk science would be admitted in the criminal trial?

Mr. ZWEIG. It's almost never the same. There's a fundamental proof that's used in civil trials and it's called causation. Did a particular cause lead to a certain effect? And the effect is usually somebody's health or life being adversely affected. In the criminal area, the question goes usually to identification of several suspects and their connection with a crime scene or victim.

Mr. NADLER. Or to causation in a criminal trial. For example——

Mr. ZWEIG. Maybe poisoning.

Mr. NADLER. Well, yes. The difference between a criminal and civil trial could be in a civil trial someone produced this substance which someone else ingested or inhaled, as a result of which was the subsequent death or ill health, which was through negligence allowed to come into contact with that person? In the criminal trial it wasn't negligence; it was deliberate, but you've got the same question. Was it——

Mr. ZWEIG. Well, it's theoretically the same question, but I doubt that actually it is. Most forensic evidence hinges on blood type, fingerprint, and other tests of body parts, fluids, systems, each of which would be called into question in a presumption of inadmissibility.

Mr. NADLER. I thank you.

I have one more question for Mr. Charrow, a very brief question. What you said, basically—everything I heard you say this morning goes along the line that jurors are getting fed science, junk science, and it's very difficult for them to determine what is correct, what is valid science, what isn't, and we have to protect them from that. Is your objection really to the standard of admissibility of scientific evidence or is your problem really with the competence of jurors as opposed to judges to make determinations as to validity of evidence?

Mr. CHARROW. The Federal Rules of Evidence recognize that the factfinder, whether the factfinder is a judge or a juror, needs assistance when faced with issues of science. That's what the Congress decided 20 years ago when it enacted the Federal Rules of Evidence, and I think it was a wise choice. I think the issue we're facing today, and the courts have been facing, is how best can we ensure that our teacher is really a teacher and not a charlatan or a teacher who is teaching for the benefit of the classroom and not someone who is teaching for the benefit of a client.

I think the *Daubert* opinion helps us along when developing techniques, to make sure the techniques that were used were appropriate, and I think the amendment to the Federal Rules of Evidence proposed in this piece of legislation would ensure that the ultimate conclusion that the expert provides is, in fact, in accordance with scientific norms. That's all it does.

Thank you.

Mr. NADLER. Thank you, and thank you, Mr. Chairman.

Mr. MOORHEAD. I would say it's probably a mistake to say that the bill will be changed because that's up to the majority of the members of the committee; of course, you know that.

Mr. CHARROW. As I'm sure the committee realizes, there are provisions in the Federal Rules that treat evidence in criminal cases differently than evidence in civil cases. So Congress made that choice 20 years ago.

Mr. MOORHEAD. The gentleman from Ohio, Mr. Hoke, is recognized.

Mr. HOKE. Thank you, Mr. Chairman.

It's about 10 years since I've practiced law at the—in a courtroom. And, Mr. Roisman, you have reminded me how—your presentation has reminded me how overstatement and hyperbole are some of the most effective tools of an effective litigant who is successful. I mean, there were two things that I heard you say that I just—I need to comment on, and then I've got some questions that I want to pursue.

One was you had indicated that when you—Dr. Zweig's testimony, in surveying whether or not there was a problem in this area, said that he characterized his testimony as saying that there is absolutely none. That's certainly not what I got out of his testimony. And you characterized Mr. Charrow as saying that all scientific expert witnesses are charlatans. I didn't hear him say that, either. I think that there are problems in this area that we're trying to solve, but I'm not sure that that kind of overstatement is particularly helpful.

I would like to go—I don't think that we have really examined section (c) very much. Dr. Zweig, you indicated that you have no problem with it. It's the one that says that testimony by a witness who is disqualified is inadmissible if the witness is entitled to receive any compensation contingent on the result, essentially. Why do you have no problem with that?

Mr. ZWIG. I don't have an empirical basis for an opinion that would support it. I can't cite statistics. I doubt that statistics exist in this area.

When I was asked to testify, I called up 20 of my favorite judges from around the country and asked, "Is this a problem in your court?" And to a person, they said it wasn't a problem as an upfront matter; that if people wanted to put sweeteners into expert witness fees, they don't do it by contingent fees, partly in deference to local canons of ethics, partly in conformance to local law, and partly just to hide it. And so I got a little encyclopedia of how people can sweeten expert witness fees. One of them is to pay year-end bonuses. Another is—

Mr. HOKE. That's if the person is an employee of the particular—

Mr. ZWEIG. Not necessarily.

Mr. HOKE. Oh, you just do it as a 1099 bonus to a—I see. OK. With no appearance that it has any relationship whatsoever to the particular litigation?

Mr. ZWEIG. Yes.

Mr. HOKE. That's interesting.

Mr. ZWEIG. Another way of hiding it was to increase the fee in a subsequent case for that same expert to testify, maybe double or triple. And, in any case, it's an under-the-table relationship, according to the anecdotal information collected.

Mr. HOKE. Is any of the advertising in this area that you discussed, and that Mr. Charrow at least showed apparently exists, does any of it advertise that a person is willing to testify for a contingent fee?

Mr. ZWEIG. I have not seen such an offer by an individual expert witness, but expert witnesses frequently are gathered by headhunters and clearinghouses who bring them together into rosters, and they occasionally advertise. Sometimes directly and sometimes by intimation and implication, assertions are made that there exist ethically acceptable ways of handling fees on a contingent basis or in the nature of a contingent basis. I have not studied this and I do not know who has.

Mr. HOKE. Mr. Roisman, you indicated that the common sense—when we were talking about contingent fees, you felt that there's no reason to have this disqualification provision in there because I think you said common sense would tell you that a jury would disqualify or discount the testimony or testimonial evidence given by a scientific expert. Can you explain what you meant by that?

Mr. ROISMAN. Sure. Just as we're, I think, all in agreement that an expert who testifies contingent on the outcome of the case getting paid represents an expert whose opinion is not very reliable. That's really what we're assuming. The jurors equally understand that. I, as a lawyer, wouldn't even consider, have never had an expert suggest such an arrangement to me, and wouldn't consider using it if they did. And, as Judge Winter points out, it's pretty much prohibited in almost every jurisdiction under the disciplinary rules.

So I think just common sense would say, who would put such an expert up? You wouldn't trust that expert's opinion if you knew that they were testifying on a contingent basis.

Mr. HOKE. Why do you suppose it is that's it so self-evident that that kind of financial pecuniary incentive in the outcome of a case is unethical and knee-jerk wrong when it comes to an expert witness, but that we don't have that same kind of knee-jerk reaction of a lack of ethics when it comes to the fee arrangements that attorneys themselves enter into in the same situation?

Mr. ROISMAN. Oh, because they're entirely two different purposes. As we've been discussing here this morning, the goal of the expert is to give you an objective opinion about a particular issue.

Mr. HOKE. Do you think then—

Mr. ROISMAN. The goal of the lawyer is to be an advocate for one particular point of view, and it's precisely that that makes the expert not a very good expert. You don't want an expert—I don't hire

experts to be my advocates. I go to the experts to tell me what they believe and then tell the jury what they believe.

Mr. HOKE. Well, just one thing on that point, and that is that I'd like to point out to you that in all of the nations in Europe except for Greece the same kind of visceral revulsion that you experience for the notion of having a contingent-fee arrangement for an expert, an objective expert, is experienced in their legal systems with respect to the attorneys having that same kind of relationships with their clients in terms of contingent fees, and they're illegal over there.

But I wonder if, based on that, if you feel that the main thing here is for objectivity, that the other proposal where the court itself is the one that is appointing the expert, does that become more attractive to you as an alternative?

Mr. ROISMAN. The problem with the court-appointed expert as the only expert, which I gather is what you're suggesting to me, is that as the scientific community has recognized—and there's reference to it in the *Daubert* opinion; there were various scientific groups submitting amicus briefs there—science is not a monolithic system. That's why the Supreme Court focused on reasoning and methodology, because two scientists looking at the same material may see it and have different opinions about what it means. The purpose of the jury trial is to have that disagreement resolved one way or the other, so the parties can go on with their lives. Trying to find one expert who somehow or another encapsulates the one view when it's not a subject on which there is one view is extremely difficult. The rule 706 of the Federal Rules of Evidence that now exists asks—gives the court the authority, if it wishes, to bring in another expert who will do, as Dr. Zweig said, lay the background for the jury so that they understand these two competing experts. But this competition of scientific views is part of what our dispute resolution system is about.

Mr. HOKE. I'd like to explore that more. I see I'm out of time. Maybe we'll get a round—an opportunity for a second round of questions from the chairman, but I think, Mr. Chair, I don't want to—I'd like to give you an opportunity to say something, if you—

Mr. MOORHEAD. Go right ahead.

Mr. HOKE. Oh, go right ahead?

Mr. MOORHEAD. Yes.

Mr. HOKE. Oh, OK.

Well, I know that—let me—Mr. Chair, you wanted to add something, I see, and then I wanted to explore this other thing.

Mr. CHARROW. Yes, if you don't mind—I think the point he raises is a very good one, Congressman. I think the real purpose of a 706 expert from a practical sense is the 706 expert acts as the governor. A plaintiff's lawyer and the defense lawyer are going to be very careful who they choose as their experts if they know there is going to be a court-appointed expert assisting the judge and the jury in the process. That, in my view, is the real benefit of a 706 expert.

Mr. HOKE. Well, would it make sense that there be an affirmative obligation on the part of the court to initiate the first expert, the first scientific expert, and if that person—if either party then wants to either rebut or color that expert's testimony with other

testimony, such as what you were discussing, Mr. Roisman, would it—does it make sense that we change the order, I guess, in terms of where do we start? Do we start with someone that is assumed to be objective because—or more objective, OK, assumed to be more objective without an advocacy role because he or she has been appointed by the court, and would that assist in coming up with just outcomes, which is obviously what we're trying to do here?

Mr. CHARROW. I think it would go a long way toward that. It would certainly improve the quality of jury decisionmaking. I think it would improve the quality of the judge's decisionmaking. And, indeed, as we have more experts involved, as Mr. Roisman suggests, the more the merrier. It's going to improve the overall quality of decisionmaking, which is, I think, what all three of us—and I know the subcommittee—want to do.

Mr. HOKE. What do you feel about that, Dr. Zweig, the idea of putting this affirmative obligation on the court to be the first appointer of expert testimony or opinion?

Mr. ZWEIG. An affirmative obligation on the court? By that, do you mean, Congressman, that you'd add requirements in the Federal Rules of Evidence?

Mr. HOKE [Nods affirmatively].

Mr. ZWEIG. *Daubert* goes a long way to sort of do that by requiring the judicial screening duty. It discusses independent neutral experts to some extent. The authority is there for doing it.

The Federal Judicial Center has undertaken studies and found that the lion's share of the Federal bench is glad to have that authority and thinks it may be useful. About one in five Federal judges, 20 percent, has actually used it. And because of the way that the control over the adversary process is vested in the parties so judges are worried that the court's expert comes in with extra credibility and can tilt the playing field inordinately and inappropriately. Many judges are worried that it is impossible for even the court's expert to shed bias; that the way that questions are asked and solved in science is not bias or value-free; it's subjected to the light of day through an orderly process for disproving a proposition, or, in the alternative, approving it. But it's not that there aren't preferences and judgments made.

Federal judges also seem to think that it's very important to find the right case, those in which the evidence is so unobvious and the process of discovery so complex that it's very hard to get a handle on it as one kind of case. But I haven't heard Mr. Charrow's governor role alluded to as one that judges would prefer. If it were to be a governor role of expert testimony in general, it might be preferable to, as an accountability measure, than to restrict it to scientific testimony specifically.

Mr. ROISMAN. Mr. Hoke, could I just add one thing?

Mr. HOKE. Sure.

Mr. ROISMAN. The American Association for the Advancement of Science, in conjunction with the Federal judges, is now in the process of running a pilot study of exactly how rule 706 might work to be—and the point is to see new ways of using it more. I think some of the questions that you are raising are of interest as things that they might want to try in this pilot study. The authority is there

in terms of the ability of a Federal judge to do what you're suggesting, if they chose to.

One of the people involved in the studies is in the audience today and I'm on one of the advisory panels related to it. I hope that they'll take into account that, and if you've got other suggestions as to ways in which the "independent expert" could be used effectively in these court cases, it would be very helpful to have that input. Since the study is really just about to start, this is a good time to get that input.

Mr. HOKE. Well, I understand what, Dr. Zweig, you're talking about with respect to the independent expert also having his or her own biases, but it seems to me that you've gone an awful long way—the biases will never be ones that are aimed at a particular party. The biases may be——

Mr. ZWEIG. That is absolutely correct, Congressman.

Mr. HOKE. They may be in favor of a particular interpretation.

Mr. ZWEIG. That's absolutely correct. And I would even venture a measure stronger than that. Most scientists do not want to get involved, in my experience, in the justice system as party hired guns. They feel that their scientific integrity is likely to be damaged and the time and effort spent go awry. On the other hand, when approached about testifying as the court's witness or of assisting the court in a counseling and advisory capacity, I see no such reticence.

Mr. HOKE. Do you—as a final question—do you see any of the—Mr. Roisman mentioned a number of—and maybe, Mr. Charrow, you want to answer this also—a laundry list of potential problems that would result from being able to—or from disqualifying as a matter of law experts who have a pecuniary interest in the result on a contingent basis, do you see any dangers in codifying that?

Mr. ZWEIG. I do not.

Mr. HOKE. Do you, Mr. Charrow?

Mr. CHARROW. I do not.

Mr. HOKE. OK. I have a lot of other questions, but I guess we'll——

Mr. MOORHEAD. If you have important questions that you want answered, go right ahead and ask them.

Mr. HOKE. That this is OK now?

Mr. MOORHEAD. Yes.

Mr. HOKE. All right. I'm going to—if I could take—it probably won't sound nearly as important as——

Mr. MOORHEAD. Go right ahead.

Mr. HOKE. All right.

Mr. Charrow, the other area that I wanted to explore in here is we've got two parts of part (b) of this, adequate basis for opinion, No. 1 and No. 2. I see no—I see nothing problematic about part 1 where we're saying that the opinion is based on scientifically valid reasoning, but I do see that the request that we're making of the court, the determination that we're making, that we're asking the court to make in part 2 to determine that the evidence is sufficiently reliable, so the probative value—the probative value of it outweighs the dangers, it seems to me that that's an awful lot harder determination than the determination in part 1.

I wonder if maybe you could respond to that. I'm going to ask Dr. Zweig and Mr.—I think I probably won't ask Mr. Roisman to respond to that. I know how he's going to respond. But I wonder if you might shed some light on that because I think that some of the concerns that Mr. Roisman has raised regarding additional hearings and a protraction of litigation, that these are not unpersuasive.

Mr. CHARROW. No, I think the issue of how costly will this amendment be is certainly something that this subcommittee rightfully should consider. I think in the long run the amendment is probably going to save us money for the following reasons:

No. 1, these hearings are taking place already under *Daubert*. They do consume a lot of time under *Daubert*, but they do save us money in the long run under *Daubert*. And why is that? A number of cases vanish when the judges rule that the experts are not qualified to give the opinions. So they disappear. So both plaintiff's counsel and defense counsel are saved 4, 6, 8 weeks' worth of trial costs. And, believe me, that's substantial.

I think a lot of people are not filing suits that they might otherwise would have in light of *Daubert*. So, all and all, I think the clarification to the rule that the Supreme Court made in 1993, is having a beneficial effect. I think it's saving money.

Mr. HOKE. What do you think, Dr. Zweig?

Mr. ZWEIG. Would you like me to address Mr. Charrow's comment, Congressman, or—

Mr. HOKE. I'm particularly concerned about the second section of this as creating—I mean, creating more of a problem in terms of protraction and numbers of hearings, but I'm also—but I would be interested in—I mean, if these hearings are, in fact, happening now; do you agree; is that the case or—

Mr. ZWEIG. I think that the hearings, the pretrial hearings on the admissibility of evidence, are occurring. I do not think that they are predicated so much on the balancing test of section 403, which permits—and some will argue requires—a judge to exclude evidence if the probative value already in current law outweighs its tendency to confuse, prejudice, or mislead a jury.

I understand that Judge Winter in his letter to the subcommittee has labeled this as a reverse balancing test. But I do not on the face of the legislation here see this particular piece as that problematic. It may spur satellite litigation, but any change will spur satellite litigation. I don't think that in the ordinary course of events it adds a procedural burden.

Mr. HOKE. So the real—besides section (c), which really goes to a very different issue, you're saying that the teeth in this, and the recapitulation or the restatement of *Daubert*, really is in (b)(1)?

Mr. ZWEIG. Well, the teeth are in subsection (b), the body of the text following "adequate basis for opinion," and the instruction to the court for the standard for rebuttal is in (b)(1). The body of (b) is the anvil and (b)(1) is the hammer.

Mr. HOKE. What would (b)(2) be, a little flux perhaps?

[Laughter.]

Mr. ZWEIG. It seems to me that (b)(2) is an underscoring of a balancing duty that did not appear to me judges have difficulty ordinarily accomplishing, but I may be missing something in my under-

standing, and I have not had a chance to review that in detail in Judge Winter's letter.

Mr. HOKE. All right. I thank the chairman for his indulgence very much. Thank you.

Mr. MOORHEAD. Thank you very much.

And this would conclude the testimony and the questioning of the first panel.

Mr. ZWEIG. Thank you.

Mr. CHARROW. Thank you, Mr. Chairman.

Mr. ROISMAN. Thank you, Mr. Chairman.

Mr. MOORHEAD. I would like to greet our second panel. Our first witness is Mr. David C. Weiner, a lawyer in private practice with the firm of Hahn Loeser & Parks of Cleveland, OH. For the past 25 years, Mr. Weiner has been actively engaged in the practice of commercial litigation. He is also the chairman of the American Bar Association Section of Litigation and a member of the American Bar Association house of delegates. In addition, he has written and taught a number of litigation-related continuing legal education activities.

Welcome, Mr. Weiner.

Mr. WEINER. Thank you, Mr. Chairman.

Mr. MOORHEAD. Our next witness is Michael J. Horowitz, a senior fellow at the Hudson Institute. Prior to joining the Hudson Institute, he was a senior fellow at the Manhattan Institute. You were in a lot of institutes, Mr. Horowitz. From 1981 to 1985, he served as the General Counsel of the Office of Management and Budget.

In addition, he was an associate professor of law at the University of Mississippi, and he has served as an adjunct professor at Georgetown Law School. Mr. Horowitz has written extensively in the area of tort reform. One of his most recent articles is entitled, "Making Ethics Real, Making Ethics Work: A Proposal for Contingency Fee Reform."

Welcome, Mr. Horowitz.

Mr. HOROWITZ. Thank you, Mr. Chairman.

Mr. MOORHEAD. Our third witness is Mr. William Fry, the executive director of HALT, An Organization of Americans for Legal Reform. At one time Mr. Fry was general counsel to the New York City Anti-Poverty Agency and assistant dean of urban affairs at Columbia Law School. In 1972, he established the National Paralegal Institute in Washington, DC, and in 1978, he created the National Public Law Training Center which trained nonlawyer advocates employed in nonprofit projects serving the elderly, handicapped, and disadvantaged. HALT, under the directorship of Mr. Fry, is dedicated to promoting greater access to rights and the courts through the use of independent paralegals, self-help, and the simplification and reform of probate, small claims, tort law, and lawyer discipline.

Welcome, Mr. Fry.

Mr. FRY. Thank you, Mr. Chairman.

Mr. MOORHEAD. We have your statements, which I ask unanimous consent to be made a part of the record, and ask that you summarize your statement in 10 minutes or less. I ask the sub-

committee to hold their questions until all three panelists have completed.

Now we have a problem. The bells have rung for another vote. Votes are coming every 20 minutes in reality. Would one of you like to go over and vote rightaway and come back, so that you can take the Chair, and put it forward, so we don't lose as much time? Either you, Mr. Hoke, or Mr. Goodlatte? There will be a lag, but there won't be that much. Would you rather just adjourn? OK, well, that's all right then. We'll just have to adjourn.

Mr. HOKE. I would be happy to, but I don't want to not—I don't want to miss my friend from Cleveland's testimony, and I think he's going first.

Mr. MOORHEAD. So because the testimony's 10 minutes and we only have time for 5 minutes before we have to go, we'll adjourn for 15 minutes and go and vote and come back.

[Recess.]

Mr. MOORHEAD. Will the subcommittee please come to order?

Mr. Weiner.

**STATEMENT OF DAVID C. WEINER, ATTORNEY AT LAW, HAHN
LOESER & PARKS, CLEVELAND, OH**

Mr. WEINER. Thank you, Mr. Chairman. I appreciate the opportunity of being here today.

As you noted, I am the chairman of the Litigation Section of the American Bar Association, but I have to make it clear that I am not speaking on behalf of the American Bar at this time, but only as a practicing lawyer with about 25 years' experience in civil litigation and experience as chairman of our Case Management Task Force in the Northern District of Ohio dealing with the rules in our court on case management and efforts to make the civil litigation system in the Northern District of Ohio more user-friendly, less costly, more quick to resolution.

I will point out to the Chair and the members of the committee that the American Bar Association will be considering many aspects of the Common Sense Legal Reform Act of 1995 at its mid-year meeting which starts Monday in Miami, and there will be resolutions presented to the house of delegates, which is the policy-making arm of that group, on many of these issues. We would hope that the committee could leave open the record, so that whatever the ultimate resolutions of those resolutions are will be known to the committee for your consideration, and we'd appreciate that opportunity.

In addressing the question of prior notice, which is in section 105, I would state to the committee the following: I don't think it will be an effective piece of legislation to deal with so-called frivolous lawsuits. I don't think it will prevent the filing of frivolous lawsuits, and if that's the intention of the legislation, I don't think it will achieve that goal. I do not think it will help to deal with the twin evils of cost and delay. I think it will hurt in both of those respects, and I'll try to explain why.

First of all, it's obvious that this section of 105 has to have some exceptions. You couldn't have a law that said you must wait 30 days before filing a lawsuit without any exceptions because there are situations that you need to go forward without giving notice to

the other side. So then you have those exceptions. I would submit that the exceptions in this bill, and in any bill that you could craft carefully, would be too broad to be very effective.

For example, it would not be difficult for any lawyer worth her or his salt to come up with an exception to get around the 30-day rule, if they thought that was in the interest of their client. It would not be hard to imagine a situation before filing the 30-day notice that you said you were worried that the defendant was insolvent or in a financial condition that might lead it to be insolvent, and so, therefore, you didn't want to wait the 30 days to file your lawsuit.

I think what you will find, if this bill was enacted, you would find some very horrendous situations for clients. I gave one in my written testimony. I'm sorry that Congressman Hoke isn't here because I wrote it for him, being from Cleveland, as I am. You could imagine the situation where I'm a lawyer in Cleveland and I've been hired by a client to sue someone in Albuquerque, NM, because the contract that was engaged in between these two parties was breached and to the disfavor of the Cleveland client. The Cleveland client hires me. I say, fine, it looks like you do have a breach of contract; we can file a lawsuit here in the Federal court in the Northern District of Ohio, your hometown, where you won't have to travel. We'll sue this person because we have jurisdiction over it because they sold their goods here in Ohio.

But because of section 105, I will have to give notice to the person out in Albuquerque that we're going to sue them and why we're going to sue them, and so forth. Well, I give that notice dutifully. I follow the prescripts of 105, and, sure enough, 2 days later, the person in Albuquerque, finding an exception to 105, or at least thinking they have an exception to 105, sues my client in Albuquerque. Now no longer is my client going to be able to not travel, not have the advantage of not having to travel, and all the things that go with being sued in an out-of-town court. So that would be a very bad thing.

Now you might well say, well, you know, if they had an exception to the rule, you might have had an exception to the rule, but in my looking at it, I didn't find one. They say they do. What would happen is you'd have a lot of pretrial fights over whether or not there was an exception that they had in Albuquerque or they didn't have an exception. You'd have to hire an Albuquerque lawyer. You'd have to go through a motion practice. It would take more time and more delay. That is not a good situation. I think that would happen far too often in section 105.

I would also submit to this committee that in the real world in the vast majority cases—I don't want to use hyperbole or overstatement because I saw other witnesses get in trouble allegedly for doing that. In the real world most good lawyers will give notice to the other side if they think that notice will help facilitate getting there solution of the matter without going to court. We do that day-in and day-out. In our law firm we receive those from lawyers from all across the country. It's a demand letter: payup; stop doing this; start doing that; start complying; stop complying. It's done routinely in the practice of law. All lawyers know that. It often helps; sometimes it doesn't help, but they do it in the routine practice. I

don't think a section 105 will aid in that because of the problems in trying to enforce a 105.

You have a couple of other ancillary problems with 105, in my mind, and that is, there is a risk, albeit, hopefully, slight, that a defendant receiving this prenotice filing and having no obligation possibly, would do something with the evidence that would hurt having the outcome of the case decided on all the evidence that is relevant to the case.

There's also the question on 105 that says the person giving the notice has to set forth with the amount of damages. That's often difficult to do at the outset. Sometime you don't know exactly what the amount of damages is. The courts have gone away from that kind of pleading requirement.

Let me suggest to this committee that the better way of attacking this problem of trying—I think what you're trying to get at is you're trying to get matters that are a dispute between people over with more quickly and more cheaply. If that is the intention of this 105—and I would hope it is—why not think about a law that would instill a 30-day cooling period or some other cooling period from the time the lawsuit is filed until any action has to be taken that would run up any cost or expense? That would give people an opportunity to try to settle their cases. You wouldn't be disadvantaged by having to be sued in some jurisdiction you didn't want to be. You wouldn't have to go through the prenotice requirement and find out whether you have an exception or not. Possibly, the courts could institute an ADR procedure at that point and you could have the same outcome without disadvantaging the plaintiff.

That really concludes my statements on the prior notice aspects of 105. In my testimony to this committee, as you well know, Mr. Chairman, I spoke about other issues. One of them was the one you dealt with earlier this morning, the honesty-in-evidence thing. I would say to you that the debate that went on this morning is great evidence to me, as a practicing lawyer, that the Congress was right when they enacted the rules enabling process back some years ago that have the Rules of Evidence and the Rules of Civil Procedure dealt with by the Rules Enabling Act process, where the judiciary and the practicing lawyers and the public all get together; they look at the evidence; they talk about what the problems are; they try to resolve what the problems are; they come up with the new rules through that process; they go to the Supreme Court; they come ultimately to Congress for your review and passage or stoppage, as the case I guess is. I would suggest to you in the rules process in the evidence area, the expert evidence area, the rule 11 process, the rule changes in the securities laws—all those areas that are affected by—affect the civil rules or the evidence rules are much better dealt with by the rules enabling process.

One other area I would just mention briefly, and I know you had a lot of testimony on this on Monday of this week. It is the position—it isn't only my position, but it is the position of our section that the loser-pay provisions in H.R. 10; they would be—they would result in what we like to describe as a regressive tax on the right to litigate for many middle class Americans who would be faced with the situation that they were going to lose their right to go to Federal court; they would have to face the situation not only of

paying their own lawyer, but the other side's lawyer in the event they lose.

I think many close cases are tossups. I've tried a lot of cases. Most of the cases I've tried have been tossups because the ones that aren't tossups get settled, and I'd hate to think that my client not only had to pay me, but the other side's fees in all those close cases. Sometimes you win the close cases; sometimes you lose them. It's too much of a burden to put on middle class Americans and the poor to have them pay both sides of that.

There's also—you know about the experience that Florida had with this. It didn't work well. The English situation is the reason we are all talking about loser-pay. As it was demonstrated to you by the learned article in one of the testimonies that was given to you on Monday, England is not the United States; it doesn't apply over here. They have a lot of different situations over there that we don't have here. They get a lot of legal aid. People of \$45,000 a year and under get their free lawsuits. So they don't have a problem. Unions pay for a lot of the lawsuits. They have insurance for lawsuits that we don't have. The English system just does not fit within the American system when it comes to loser-pay.

There's a lot of remedies to take care of frivolous lawsuits. Perhaps you don't think there are enough remedies, but the loser-pay is not the way to go to deal with frivolous lawsuits.

I will conclude my testimony at that point. Thank you, Mr. Chairman.

[The prepared statement of Mr. Weiner follows:]

PREPARED STATEMENT OF DAVID C. WEINER, ATTORNEY AT LAW, HAHN LOESER & PARKS, CLEVELAND, OH

I am David C. Weiner, a lawyer in private practice in Cleveland, Ohio, with the 75-year old firm of Hahn Loeser & Parks. I am Chairman of that 100 lawyer firm which has offices in Cleveland and Columbus. For the past 25 years I have had an active commercial litigation practice representing businesses in a variety of disputes in federal and state courts.

In addition to my litigation practice, I am currently the Chairman of the ABA Section of Litigation, the largest section in the American Bar Association. The Section has over 65,000 members, drawing from a cross-section of the profession, plaintiffs' lawyers, defense lawyers, government lawyers, academicians, public service lawyers, and the like. I have also served since 1980 as a member of the ABA House of Delegates, the policy-making arm of the Association. In addition, I have written, taught and spoken on a variety of litigation related continuing legal education activities, particularly in the areas of civil justice reform and how to make our system of civil litigation more "user friendly."

I am not now speaking on behalf of either the ABA or the Section of Litigation. The ABA House of Delegates will be considering resolutions this coming Monday and Tuesday (February 13 and 14, 1995) relating to many aspects of HR-10. Those resolutions are sponsored by the Section of Litigation and are consistent with my views today. I would encourage this Committee to keep the record open on this legislation for a week or two so that any resolution adopted by the ABA House of Delegates could be presented to the Committee for its consideration when votes are being decided.

During the past three years I have served on the Northern District of Ohio Civil Justice Reform Act Advisory Committee as Vice-Chairman and as Chairman of that Committee's Task Force on Differentiated Case Management. Our District was one of only two Congressionally-mandated demonstration districts. Our Task Force had the responsibility of creating a plan for our Court which would address the twin evils of cost and delay. As the Chair of that Task Force I have been intimately involved in considering and ultimately recommending a plan which would result in lowering litigants time to resolution and decreasing the cost to have matters resolved. During the course of the work of our Task Force, we considered the various elements being proposed by HR-10, particularly those involving pre-suit notice and

"loser pay." Those ideas were carefully considered and rejected as ideas which would hinder efforts to make the civil justice system in our federal court more efficient and effective, while maintaining access for all citizens who have a dispute. Our District has completed three years under its new rules. As a result of the recommendations of the Task Force, we have greatly diminished the number of outstanding cases and outstanding motions while increasing the speed to resolution. Such progress could not have been achieved if the provisions of HR-10 had been part of our rules.

The proposed changes discussed below do not address the real problems of our civil justice system and would create more expense and more delay.

1. LOSER PAY

A hallmark of the American justice system has been the goal of providing access to justice for all, not merely to a limited class of our people. To foster and maintain that guiding principle, the organized bar has long been a supporter of (a) legal services for the poor, (b) the allocation of more resources to the court system, (c) improvements in the efficiency of handling cases, and (d) expanding the use of alternative dispute resolution. The ABA and other professional groups have also led the way in preserving diversity jurisdiction in the Federal courts, a fundamental grant of jurisdiction, the importance of which continues undiminished.

The so-called "loser pay" provision in HR-10 would seriously affect access to justice while undermining diversity jurisdiction in a fundamental way. For the first time this proposal would implement a loser pays requirement on all diversity cases filed in federal court, imposing this requirement without regard to the identity of the parties or the subject matter of the litigation.

The Bill provides that the District Court "shall award" to the party that "prevails" a reasonable attorney's fee that may not exceed the actual attorneys fees of the non-prevailing party or, if no such fee was incurred because the non-prevailing party had a contingency fee agreement, the reasonable fee that would have been incurred by that party if that party were represented by an attorney proceeding on a non-contingent basis. The only discretion given to the Court is to refuse or reduce an award if the Court finds "special circumstances" that would make an award "unjust," terms otherwise undefined. The problems with this loser pays provision are profound.

First, and most important, it undermines access to the federal courts by the middle class and the poor. All of the advantages provided by the time-honored availability of lawyers who will take matters on contingent fees are jettisoned by the fact that the client who hires a lawyer on a contingent fee basis, if she were to lose, would be responsible for the fees of the other side. Even for those who are able to proceed on a non-contingent fee basis, the fact that the individual or small company might be liable not just for their lawyer's fees but for double those fees means that the access to the courthouse will be reduced.

The proposal would also fall harshly upon those who bring litigation to vindicate public rights and establish important principles. Entities that bring such litigation have difficulty obtaining lawyers and finding the necessary funding for legal services now. If in pressing such litigation in the future they were forced to confront the penalty effected by this loser pays rule, much, if not all, of this important law-shaping litigation will not be brought in the federal courts.

The rule is in effect a regressive tax on the right to litigate. A fee shifting statute will not deter wealthy corporations and individuals from litigating their claims. The rule will bind more and more until it reaches the poorest of our citizens, who only can proceed through counsel who undertakes the matter on a contingency fee or on a pro bono basis. But the benefits offered by those two alternatives would be totally eliminated by this legislation.

The proposal apparently draws on the experience with fee-shifting provisions that are employed in England and Wales. When supporters of this proposal look across the Atlantic for support, they fail to acknowledge that all litigants in England and Wales whose incomes are below \$45,000 a year receive complete free legal services and for them loser pays is no deterrent.

Its advocates suggest that one purpose of the rule is eradicating frivolous litigation. The problem is that the proposal makes no distinction between cases that are frivolous and those that are meritorious; all are subject to the same draconian provision. Thus, it will discourage the institution of any litigation unless the individual or small company is so convinced of the merits of its case that it is prepared to run the significant risk of the fine this legislation imposes. This country should never find itself in the position of suggesting that the courts are only open for disputes where the result is certain. It is just in those situations where either the facts and/

or the law present close questions that the courts provide an extraordinary service to our citizens for resolving their disputes.

The courts today have ample authority to deal with the frivolous lawsuit and to charge attorneys fees against the loser in cases where such extraordinary relief is appropriate. That court-imposed remedy is more than sufficient to penalize those who truly abuse our system of justice by bringing vexatious and frivolous litigation.

The proposal is a frontal attack designed to end diversity jurisdiction, without repealing 28 U.S.C. § 1331. It virtually requires many who would otherwise be entitled to bring cases within that jurisdiction to file their claims in state court in order to avoid the vise created by its fee shifting terms. Thus, *sub rosa*, the legislation creates a situation where the important benefit of being able to come into federal court, one long supported by the bar, public interest groups and corporations alone, is only available to those for whom the "penalty" exacted by loser pays is something they can afford.

The proposal gives no equivalent choice to defendants who are forced into a loser pays situation by the choice made by the plaintiff. While it is easy to over-generalize and assume all plaintiffs will avoid loser pays at all costs and all defendants will embrace it, in fact many defendants, because of their limited means, will be shocked to learn that in order to have an opportunity to present what they believe to be a meritorious, albeit close-question-defense, must run the risk of paying not only their fees, but the fees of the plaintiff as well. The "judgment proof" plaintiff will not be well received by the "winning" defendant which seeks to recover its attorneys' fees.

The proposal will foster legal maneuvering as parties try to become federal "plaintiffs" or "defendants" to take advantage of or avoid the operation of the statute. Defendants sued in state courts will file federal declaratory judgment actions and defendants sued in federal court will file non-removable state court actions. All of which will give rise to ancillary litigation over whether fees should be shifted and which cases should proceed or be stayed as multiple judges are presented with precisely the same claims.

The proposal will introduce into the settlement process economic leverage unrelated to the merits of the claims. The experience in England demonstrates this point. There cases in which fee-shifting is applicable settle at about one-half the value of cases where it does not apply.

The problems with loser-pays legislation were best highlighted by the Federal Courts Study Committee chaired by Judge Joseph F. Weis, Jr. of the Third Circuit Court of Appeals. What that august group concuded bears repeating here:

Although sometimes advocated, a general rulemaking losing parties fully liable for the winners' reasonable attorney fees is a radical measure that would be inconsistent with traditional American attitudes toward access to courts. Such a rule would work harshly in close cases, especially when a party advocates a position that is reasonable but is nevertheless unsuccessful. It might excessively discourage parties with plausible but not clearly winning Claims, particularly when a prospective party is risk averse—as is likely to be true of middle-class persons who cannot risk a big loss. Furthermore, the rule could actually make settlement less likely: other things being equal, it increases the negotiation gap between the litigants. Even jurisdictions like the United Kingdom that formally follow the loser-pays rule often temper it substantially, as by imposing only partial liability, providing broad public legal aid, or making the rule inapplicable in significant classes of cases.

In conclusion, while "loser pay" and its sister "the winner should be made whole" have nice rings about them, when studied it is not hard to see that, as proposed in HR-10, they are unfair to the vast majority of our citizens and contrary to our country's long system of justice—which, despite its scars, remains the envy of the world. "Loser pay" will not prevent "frivolous" lawsuits from being filed and will create even more expense, delay and turmoil.

This is a non-"reform" which should not happen.

2. RULE CHANGES

In 28 U.S.C. §§2072-74, Congress has prescribed the appropriate procedure for the formulation and adoption of rules of evidence, practice and procedure for the federal courts. This well-settled, Congressionally-specified procedure contemplates that evidentiary and procedural rules will in the first instance be considered and drafted by committees of the United States Judicial Conference, will thereafter be subject to thorough public comment and reconsideration, will then be submitted to the United States Supreme Court for consideration and promulgation, and will fi-

nally be transmitted to Congress, which retains the ultimate power to veto any rule before it takes effect.

This time-proven process proceeds from separation-of-powers concerns and is driven by the practical recognition that, among other things:

Rules of evidence and procedure are inherently a matter of intimate concern to the judiciary, which must apply them on a daily basis;

Each rule forms just one part of a complicated, interlocking whole, rendering due deliberation and public comment essential; otherwise the impact of any rule may be quite different in quality or force than that which was intended; and

The Judicial Conference is in a unique position to draft rules with care in a setting isolated from pressures that may interfere with painstaking consideration and due deliberation.

The American Bar Association has consistently supported federal rulemaking through the Judicial Conference. *See, e.g.*, the January 1982 Resolution adopted by the House of Delegates specifically urging Congress to adopt legislation that ultimately took form as 28 U.S.C. § 2073 in 1988 (expressly delegating rulemaking authority to the Judicial Conference). The rule changes proposed in HR-10 demonstrate the perils of political interference in the rulemaking process and the ineptness of the result that political rulemaking can produce.

"*Honesty in Evidence.*" Section 102 of HR-10 would add a new subdivision (b) to Rule 702 of the Federal Rules of Evidence with the avowed intention of codifying the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 125 L.Ed. 2d 469 (1993). In reality, however, this Rule 702(b) neither codifies *Daubert* accurately nor confines itself to codification:

First, Proposed Rule 702(b) distinguishes between the "validity" and the "reliability" of scientific evidence—a distinction expressly disavowed in *Daubert*, 125 L.Ed. 2d at 481 n. 9—and fails to define either term.

Second, the proposal reverses the Rule 403 balance, which *Daubert* expressly applies to Rule 702 testimony. 125 L.Ed. 2d at 484. (Rule 403 permits the exclusion of relevant evidence "if its probative value is *substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury*" (emphasis added). Proposed Rule 702(b), in contrast, requires that the proffered opinion be "sufficiently reliable so that the *probative value* of such evidence *outweighs the dangers* specified in Rule 403" (emphasis added)).

Third, Proposed Rule 702(b) is expressly limited in scope to scientific evidence, while existing Rule 702 also applies to "technical, or other specialized knowledge." This scope limitation has two important implications: (a) by operation of traditional rules of statutory interpretation, it reflects a conscious decision to bar extension of *Daubert* to other types of expert opinion testimony—something *Daubert* expressly does not do (125 L.Ed. 2d at 481 n. 8)—and (b) the result is that the reverse Rule 403 balancing test applies only to scientific opinion and not to other expert opinion testimony (which remains subject to the existing Rule 403 test). Among the problems this generates: opinion testimony is often not easily cabined as purely "scientific" (as opposed to being at least partially "technical" or "other" in character). Nor is there any apparent reason to apply different Rule 403 balancing tests to different types of opinions.

If Congress believes that codification of *Daubert* warrants further study and analysis, it should expressly commend the issue to the Judicial Conference for prompt attention—as, for example, it did last autumn in § 40153 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322.

Section 102 of HR-10 would also add a new Evidence Rule 702(c) barring testimony from expert witnesses entitled to receive any compensation contingent on the outcome of any claim with respect to which their testimony is offered. Contingent fee expert testimony is, however, already barred by DR 7-109(c) of the ABA Model Code of Professional Responsibility and, in most jurisdictions (where the practice is prohibited by law), by Rule 3.4(b) of the ABA Model Rule of Professional Conduct. In those few courts in which this practice is permitted, it can be—and doubtless is—the subject of cross-examination. (*United States v. Abel*, 469 U.S. 45 (1984) (bias impeachment permitted under Federal Rules of Evidence).) There is no warrant for Congressional usurpation of the judicial rulemaking prerogative, particularly in the absence of any urgent need or pressing problem in this area. Moreover, purely as a drafting matter, it is unclear how this proposed provision is to be reconciled—particularly in *pro bono* cases—with more than 2,000 existing fee-shifting statutes, many of which provide for expert witness fees. The Judicial Conference is, among other things, currently considering the entire issue of which ethical rules should govern in the federal district courts, a study that directly raises the contingent-fee

testimony issue. The Judicial Conference should consider the issue in the first instance, both as a matter of legal ethics and of evidence.

Rule 11. In 1983, Rule 11 was amended to require the imposition of sanctions for the filing of any litigation paper that was not well founded in fact or law. A principal reason that the experiment with mandatory-sanctions failed is that it profligately wasted scarce judicial resources. More than 7,000 sanctions decisions were reported under the 1983 version of Rule 11, and Federal Judicial Center ("FJC") empirical studies conclusively demonstrated that this represented just the tip of the iceberg.¹ In the words of Judge Sam Pointer, former Chair of the Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure:

[T]he FJC studies amply support our [the Advisory Committee's] conclusion that there has been an excessive and unproductive amount of Rule 11 activity [under the 1983 version of the Rule]. [Statement of Sam C. Pointer, Jr., before the House Judiciary Subcommittee on Intellectual Property and Judicial Administration (June 16, 1993).]

Judges applying the 1983 version of the Rule lacked discretion to decide, in marginal or trivial cases, that the time and attention necessary to determine whether sanctions should be awarded were not worth the effort. Consequently, judicial resources were pointlessly consumed when federal courts were repeatedly required to engage in extended analysis to decide inconsequential issues—for example, whether it was sanctionable for a lawyer not to read the final word processing printout of a pleading which, due to a computer glitch, included extraneous matter;² whether punishment was required for an unintended misstatement in a pleading that was clearly corrected in appended exhibits;³ or whether a single losing argument, in a brief containing many solid arguments, had to be punished.⁴ All of this was a colossal waste of judicial time.

Mandatory sanctions clogged the courts in other ways as well. For example, they also interfered with settlement because parties could not even withdraw pending sanctions motions. Once a sanctions issue had been flagged, the judge was affirmatively required to impose a sanction if he or she detected a violation. Sometimes several years elapsed between the time a lawsuit was voluntarily dismissed and the time that the judge resolved a previously-filed sanctions motion.⁵

Perhaps the failure of mandatory sanctions was most poignantly illustrated in those cases in which the district court felt constrained to penalize lawyers for asserting purportedly frivolous positions—only to have those positions vindicated on the merits on appeal.⁶ Things had obviously wandered far afield when there existed exposure to sanctions for asserting even meritorious positions in good faith.

Effective December 1, 1993, following years of study, deliberation and drafting by the Judicial Conference, Rule 11 was amended in several respects, perhaps most importantly conferring on judges the discretion whether or not to impose sanctions should a violation be found. Section 104(b) of the CSLRA would reverse this amendment, and it would stimulate even more activity than under the 1983 version of Rule 11 by adding fee shifting—the compensation of injured parties—as a new, stated purpose of the Rule. This restoration of the status quo ante would ignore all experience under the 1983 version of Rule 11, exacerbate its worst features, and resuscitate and accelerate the enormous amount of judicial time and attention devoted to nonsubstantive motion practice. It should not be enacted into law.

The Rules Enabling Act of 1934 (28 U.S.C. 2072) and the attendant legislation enacted by Congress have, over many years of practice, demonstrated the wisdom of committing the rules of evidence and procedure to the rulemaking process. The flaws of the proposed rules contained in HR-10 bear witness to the soundness of that process. Both the Honesty-in-Evidence and the Rule 11 changes should be re-

¹See *FJC Directions* No. 2, at 7 (Nov. 1991): In five districts studied by the FJC, there were only 66 published Rule 11 decisions during the years 1983-89, but the FJC study found almost 1,000 unreported cases involving Rule 11 in the shorter period of 1987-90. (In contrast, there were fewer than two dozen reported decisions construing the predecessor Rule 11 in the 45 years from 1938 to 1983.)

²*Ault v. Hustler Magazine, Inc.*, 860 F.2d 877 (9th Cir. 1988), cert. denied, 489 U.S. 1080 (1989).

³*Kusan, Inc. v. Alpha Dist., Inc.*, 693 P. Supp. 1372 (D. Conn. 1988).

⁴*Paine Webber, Inc. v. Can Am Fin. Group, Ltd.*, 121 F.R.D. 324 (N.D. Ill. 1988), *aff'd mem.*, 885 F.2d 873 (7th Cir. 1989).

⁵See, e.g., *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) (4 years passed between plaintiff's voluntary dismissal of its complaint and district court's resolution of a sanctions motion filed prior to dismissal).

⁶See, e.g., *Kucel v. Walter E. Heller & Co.*, 813 F.2d 67 (5th Cir. 1987); *Trident Center v. Connecticut Gen. Life Ins. Co.*, 847 F.2d 564 (9th Cir. 1988).

ferred to that process. However, if Congress chooses to circumvent its established practice in those two areas, for the aforementioned reasons, neither provision should be enacted. They both set back justice and hinder positive justice reform initiatives. Whatever their politics, on the merits they are bad for the citizens and courts of this country.

3. PRIOR NOTICE

Section 105 of HR-10 would impose, subject to ten wide-ranging exceptions, a 30-day pre-notice requirement on all federal civil lawsuits. Such provision is unworkable and unnecessary, would create more expense and delay and would further increase the acrimony of civil litigants. A 30-day notice requirement is an idea which has little up side and a very big down side.

The ten exceptions are so broad that any lawyer worth his or her salt could make a good faith argument that one or more exceptions applied, thus avoiding the 30-day notice requirement. For example, it would take little to support an argument that the defendant's potential insolvency (undefined for purposes of Sec. 105) obviates the need for a 30-day pre-suit notice.

Section 105 will also lead to forum shopping and gamesmanship. It will not be uncommon for a potential plaintiff residing in Ohio to give 30-day notice to a potential defendant residing in Colorado. Upon receipt of the notice the defendant, invoking one of the exceptions, then files suit against the plaintiff in Colorado. This would create a situation where the plaintiff who thought it would be suing in its home jurisdiction ends up defending thousands of miles from home, just one unhappy result of Sec. 105.

The proponents of Sec. 105 argue that such pre-suit notice will save the need to file vast numbers of federal civil suits. It is more likely that the number of suits will not diminish and the number of pre-trial skirmishes will be greatly increased, all to the detriment and expense of the litigants. Surely, there will be motions and counter motions over whether the notice was properly given, whether notice was properly delivered, and whether the proper parties were noticed, to name but a few of the areas ripe for controversy. When exceptions are invoked, which will obviate the need for notice, there will be pre-trial practice over whether or not the exception was applicable and, if not, what remedy should be imposed. It will create a new nightmare for the civil litigation system in this country.

Further, as most lawyers conduct themselves, if prior notice has even a decent chance of success, notice is presently given. Hardly a lawsuit is filed when the filing party has not given the target defendant a chance to "pay up," "change its course of conduct" or "otherwise act" if the plaintiff believes such notice has a chance of success. When it does not, there is no need for such notice and the intricacies of Sec. 105 will only add more burdens to an otherwise overburdened system.

4. ATTORNEY ACCOUNTABILITY

In an apparent effort to attack the perceived ills of the contingent fee system, the enactment of Sec. 104 of HR-10 would result in a "sense of Congress" resolution that each state should pass a law requiring all attorneys hired in a contingent fee setting to disclose in writing both their actual services and the precise hours spent on the performance of such services.

Putting aside, for the moment, that Congress, which has enough problems to deal with in the areas where it can write or re-write federal laws, should not be telling states what to do by "sense of Congress" legislation, Sec. 104 is an unwarranted and ill conceived interference with the contractual rights and responsibilities of clients and their lawyers. Such a law would only foster ill will between clients and their lawyers and will do nothing to abate the perceived ills of the contingent fee system.

Why should Congress dictate (through the states) what should (and should not) go into an agreement between lawyers and clients? What else should the law require by a party of a fee agreement? Disclosure of the lawyer's detailed plan of action; the names of the lawyers, paralegals, staff, investigators and experts who will work on the case; the disclosure of the lawyer's overhead; the disclosure of the lawyer's education and continuing education; the disclosure of the lawyer's commitment to public service activities; and the disclosure of the lawyer's "precise" experience with similar matters. This sort of list could go on and on. While the subject of contingent fees earned, as they may or may not relate to the tasks performed and time spent may be of interest to anti-contingent fee advocates, these other items are at least as relevant to the client's decision to hire his or her attorney. All of these matters are proper subjects for discussion between lawyer and client, but to mandate them upon all contracts would be foolish, if not even unlawful.

A contingent fee lawyer's worth is not determined by his or her daily time records. Their worth is measured by the results obtained for their clients. One lawyer may work 500 hours and obtain far less than another who works 50 hours. Should the latter be penalized? Clearly not. Yet, the enactment of Sec. 104 would certainly create a situation where clients would soon question or second guess the contingent fees earned by their lawyers. It would not be hard to imagine the conversation: "You mean you got X dollars and you only worked Y hours; wow, that is \$— per hour." This would inevitably lead to bad feelings, attempted re-negotiations of fee arrangements and "bad mouthing," all of which would be undeserved. After all, the bottom line is not the hours but the dollars.

Further, it is ironic that this provision is being considered at a time when attorneys who have in recent times been generally paid on an hourly basis are now being weaned from that system to a result-oriented system where hours and services performed give way to bottom line considerations. More and more corporate clients look not to hours but only to results. It would be paradoxical that as corporate America moves away from hours, injured America moves towards hourly fees which have proved to be a less than satisfactory system for establishing the proper fee for legal services performed.

Finally, all states already regulate all lawyers' fees, including contingent fees, to the extent they deem them appropriate and necessary. These regulations are the result of years of study and change and should not be altered by a "sense of Congress." There is no public outcry for such accounting from the citizens of this country who retain the services of contingent fee lawyers in times of need.

In conclusion, this "sense of Congress" legislation makes no sense and should not be imposed upon uninterested states.

Mr. MOORHEAD. Thank you.

Mr. Horowitz.

STATEMENT OF MICHAEL J. HOROWITZ, SENIOR FELLOW, HUDSON INSTITUTE

Mr. HOROWITZ. Thank you, Mr. Chairman.

I think on net that section 105 could be helpful, probably will be, in encouraging people to discuss cases and resolve cases before going to trial. There is some impulse on the part of some lawyers, not of the stature of Mr. Weiner, to just go to trial on autopilot, and that's an abuse of process and resources.

There are lots of exceptions in this bill. I see my time's up, Mr. Chairman.

[Laughter.]

Mr. HOROWITZ. And I think early notice provisions are helpful. As my testimony indicates, however, I hope that the committee will consider the real mechanisms that will generate and create incentives for the early settlement of cases, and do so on a distinctly proconsumer basis. These are early offer provisions. They are both contained—I want to set up a competition here—in the Senate bill introduced by Senators McConnell and Abraham, which I think will be very much a focus of the Senate debate on tort reform, and I am hopeful that the House will provide leadership on this score, as it has through the Contract in so many other respects.

One thing before getting to the provisions themselves is to indicate the range of support for them as distinct from lots of proposed reforms of the tort law which set up one-sided, us-against-them kinds of debates. I say this as somebody who chaired the first working group on tort reform in the Reagan administration and had something to do with generating a national debate on tort reform. It's always troubled me that tort reforms always have these muscular approaches that take rights away, and I heard what Mr. Weiner said about loser-pays. He said, and I'm in enormous sympathy with what he says, because it allows those who support it

to be caricatured—in some cases quite fairly—as favoring the deep pocket over the party with less income. I think that's inherent in loser-pays provisions.

So we've tried in these early offer mechanisms to say, before you give an advantage to a defendant, make him earn it. Make him earn it by putting something on the table for claimants, by making claimants whole. Claimants don't want lawsuits. They don't want lotteries. What they want are settlements and payments of the damages they've actually incurred.

I think that to a great degree there are abuses both by defendant's lawyers and by plaintiff's lawyers, and early-offer mechanisms create good incentives. They don't force defendants to settle, but they provide an opportunity for them to do so. Right now, defendants have the incentive, as all people who have practiced tort law from the plaintiff's side know, to squeeze plaintiff's lawyers, to say, sell out your client and you'll make \$100 an hour; if you don't, I'll see that you're subject to enough depositions, that you're going to wind up making \$25 an hour even if you get top dollar in this case.

But what we do here is change the incentive of defendants so that they will use their lawyer only in cases of real controversy. And the other thing early-offer mechanisms do is they put the contingency back in contingency-fee contracts. They end the windfalls. They restore what Justice Blackman said is the essence of the contingency fee, and that's the quid pro quo, a premium fee in exchange for assuming real risk that the lawyer won't be paid a fee. We've created, I think, a self-enforcing mechanism that will create a balanced equation, and what's the proof? Look at the support. My testimony's got it. We got just the other day an editorial in the Washington Post which was supportive. The Wall Street Journal has thundered in favor of it.

When the proposal was first introduced, Bob Bork, Bill Barr, Rex Lee, others associated with what one would call the conservative side, favored it strongly. But the same proposal, Mr. Chairman, was equally strongly endorsed by the late Erwin Griswold, by Norman Dorsen, president for 20 years of the American Civil Liberties Union, and I think quite interestingly, and perhaps most interestingly, by Bob Pitofsky, the Clinton administration Chairman of the Federal Trade Commission.

Perhaps the most interesting endorsement came out in California. Mr. Chairman, you know of proposition 103 out there, the proposition that just sought to reduce auto insurance rates by fiat. I don't think it was a workable proposition, but it was a Nader group that did it. This Nader group is now proposing our proposal in California, to adopt this early-offer mechanism that will cut the windfall contingency fees, and they have broken away from Nader. I think Ralph will always be on the side of the tort lawyers, come hell or high water. He's just an extension of the trial lawyers. But lots of consumer groups have broken away from Nader on this one, including the political director of proposition 103, who said the following:

He said he had opposed other propositions in California, notably an old proposition 106, because they were too severe. He said "attorneys would have refused to take cases under that system, which

would have limited access to justice for too many legitimate clients." But speaking of the proposal in McConnell-Abraham, says Bill Zimmerman, "This proposal is a progressive proconsumer proposal" as, indeed, I think it is.

What the proposal simply does is say to defendants, if you put money on the table and you're given incentives to do it by way of early settlement, you get this early settlement, early window to settle a case a contingency fee cannot be charged against party's offer. If the offer is not good enough, then the case can proceed, but the contingency fee is as to the difference between what the offer was and what's ultimately achieved, a form of value-added billing. That's common to condemnation cases, tax certiorari cases, an increasing number of workers' comp cases. In here two States which have had the best record on holding down worker's comp increases without reducing benefits are Oregon and Wisconsin, and they happen to be the two States which initiated this very kind of value-added billing.

What we're doing is squeezing the transaction costs out of cases where lawyers are not adding value to them, where we're locked into this kind of autopilot ritual of litigation, where defendants now look to squeeze and exploit plaintiffs through excessive hearings and intransigent settlement positions, and plaintiff's lawyers are taking routinely 33 to 40 percent fees, even in cases where there's no risk. This leads to fees in asbestos cases, for example, the fees are not uncommon at \$15,000, \$20,000, \$25,000 an hour because the lawyers are routinely taking their 33 to 40 percent where the liability is as clear as it can be. The risk-return equation is terrifically important and the proposal addresses it.

And let me tell you the payoff here. Without cutting off a single consumer right, just by facilitating faster settlements, which happens to be a progressive device—poorer people need faster settlements because they have to settle for peanuts under current conventions; they need the money right away. They don't have resources to sustain themselves when defendants keep cases going.

The immediate effects of this—and I estimate this conservatively—would be in each of your districts reductions in auto insurance rates of 15 to 20 percent, reductions in medical malpractice by the same amount and perhaps most of all, municipal liability, the biggest burden—you talk to mayors; tort costs are on a straight vertical climb, and cities are mostly self-insured. We now have the corporation counsel of New York City and its mayor, and the mayor of Indianapolis—there will be others—who actively support the proposal because it allows them, when they settle cases, to give claimants what they want, while they reduce their settlement costs by squeezing out the lawyer fees, their own and the plaintiff's lawyer fees, so that there's a reduction of somewhere between 35 to 40 percent in the cost of settling a case when they decide defendants want to settle a case.

The other provision that I've discussed is, I think, equally extraordinary. Its effects would be more for reaching even; and it is based on the bill introduced in 1984 by your former colleague, Henson Moore, and your current colleague, Richard Gephardt. Moore-Gephardt is another early-offer mechanism, and that is the way to go, I'm convinced, in tort reform.

What Moore-Gephardt says is defendant gets an early chance to agree the economic costs of a case. If the defendant makes that offer to pay the costs of a claimant over and above the claimant's own insurance, which has the effect of eliminating double payment and doing away with the collateral source rule, then if the claimant wants to sue for what's left, which is pain and suffering and punitive damages claims he can only do so by showing willful injury beyond a reasonable doubt. What this does is give claimants what they want and need, rapid settlement of cases where their real costs are assumed, not a lottery system. That's not what claimants want, to get extra cash. They want rapid payment, and Moore-Gephardt does it. The effects of Moore-Gephardt would be a reduction of the malpractice rates by somewhere, in my judgment, between 25 and 40 percent nationwide without cutting off a single substantive right.

The other thing about it that it would do, and that all early-offer mechanisms would do, Mr. Chairman—and this is stunning, in my judgment—it would in some respects be the most useful and important and far-reaching health care reform bill that Congress would have considered or could pass. I said health care. And the reason is as follows:

My time is up, and let me just finish the sentence. The reason is that the—if I may, Mr. Chairman—that the pain and suffering award is figured as a multiple of health care bills. So every time somebody runs up a health care bill for which insurance pays, he gets \$3 in pain and suffering recoveries. I've set forth in the record the rather exotic overuse of health care resources generated by the perverse incentives of the tort system. We're looking at something close to \$20 billion a year in health care savings, in my judgment, if we adopt early-offer mechanisms of this sort.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Horowitz follows:]

PREPARED STATEMENT OF MICHAEL J. HOROWITZ, SENIOR FELLOW, HUDSON INSTITUTE

Mr. Chairman and Members of the Committee: I am grateful for this opportunity to appear before the Subcommittee which will play a significant role in determining whether, for millions of Americans, our civil justice system will merit their trust. Today, alarming numbers of Americans believe that our legal system is out of control, that it is run by lawyers for the benefit of lawyers, that it operates at the expense of the general public's interests and that it is wasteful, costly and increasingly corrupt. The problems sought to be addressed by HR-10 thus go well beyond the abuses which it specifically seeks to cure, and the 104th Congress' ability to significantly reform our civil justice system may in large measure determine America's continuing faith and belief in the rule of law itself.

Sadly, the American public has a genuine basis for its escalating disesteem with the civil justice system and with the tort system in particular. Today, more than fifty cents of every dollar paid out of the tort system goes to pay attorneys' fees. Thus, even the most determined advocates of imposing strict tort liability on providers of goods and services must be daunted by a system with such unacceptably high transaction costs. Simply put, our tort system cannot be taken seriously as means of compensating injured parties unless it is made far more efficient and less litigious, and unless far larger shares of tort payments go to injured parties rather than to lawyers. The lawyer-driven character of our tort system—the public's major interface with the legal system—is certainly a major reason why a National Law Journal poll conducted in June 1993 reported that 31% of Americans regarded lawyers as less honest than most people. (Even more troublesome than the finding itself was the fact that it reflected a no doubling of negative attitudes from a similar poll taken in 1986.) Similar polls repeatedly reflect comparable public sentiments.

SECTION 105

Section 105 of HR-10, about which this panel has been asked to speak, represents a useful step in curbing excessive litigation and its attendant costs, delays and other burdens. Recognizing correctly that many lawsuits occur for *inertial* rather than *calculated* reasons, Section 105 properly requires the filing of notices of claims before lawsuits can be brought. Section 105's demand—that the bringing of a lawsuit should be a serious and solemn act and that defendants should be given the opportunity to learn of claims against them before they are sued—should encourage and facilitate more frequent and rapid case settlements. Carefully drafted to ensure that many claimants will be able, in appropriate circumstances, to initiate lawsuits without notice and/or on an immediate basis, Section 105 should help curb the *ritual drift into litigation* which today's current system unhappily permits and facilitates. Parties made aware of claims levied against them on an early basis will in many cases be able to provide satisfactory relief to claimants without becoming defendants. In its rejection of the "game-playing" style of civil litigation and in its refusal to allow the Federal Courts to be used in high-cost searches for hypothetical post-litigation advantages, Section 105 thus brings a dose of common sense to the Common Sense Legal Reforms Act of 1995. Enactment of Section 105 should be cost-beneficial for our presently overburdened courts and for an American public now properly disaffected with excessive litigation.

EARLY OFFER REFORMS

The purpose and virtue of Section 105 and its *early notice* mandate also leads naturally, Mr. Chairman, to the next logical reform step which I hope this Committee will consider as it reports HR-10 to the Floor: *early offer* reforms which serve as highly powerful tools to ensure the *early settlement* of large numbers and high proportions of cases.

In considering the enactment of early offer reforms, moreover, the Committee should be particularly encouraged by the fact that such reforms, properly drafted, are *balanced and even-handed* in dealing with the interests of claimants and defendants—offering lessened litigation burdens only to those defendants who earn such advantages because they offer direct and tangible benefits to consumers. Early offer reforms thus generate broad support across the political/policy spectrum. They create prospects for real reform, not the gridlocked "business" v. "consumer," "rights" v. "profits," and "right" v. "left" wars which to date have characterized much of the tort reform debate. Because they offer desperately needed advantages to *claimants*, early offer reforms do not cede the consumer-champion, high ground role to defenders of the status quo; to the contrary, they are broadly and properly seen as *pro-consumer reforms* which do not permit their proponents to be caricatured as persons favoring one-sided, pro-defendant, pro-deep pocket solutions to the problems of modern-day tort law.

There are two early offer reforms which I respectfully urge the Committee to consider: an early offer contingency fee reform and an early offer reform based on the remarkable model first proposed to the Congress in a 1984 medical malpractice bill introduced by Congressmen Henson Moore and Richard Gephardt.

CONTINGENCY FEE REFORM

This reform is intended to protect clients from paying overreaching windfall contingency fees. It is intended to put teeth into the governing resolution on contingency fees adopted by the Association of Trial Lawyers of America ["ATLA"] calling on lawyers to "us[*e*] a percentage in the contingent fee contract that is commensurate with the risk, cost and effort required [and to] discuss with their clients alternate [non-contingent] fee arrangements." The reform is based on the real-world fact that, the above "recommend[ations]" of ATLA to its members notwithstanding, contingency fees are the near-uniform means of compensating tort claim attorneys and, as pointed out by former Harvard University President and Harvard Law School Dean Derek Bok:

the standard contingency fee is a standard rate that seldom varies with the size of a likely settlement or the odds of prevailing in court [while the legal system] has done nothing to prevent lawyers with strong cases from pocketing their [standard rate] share of a large settlement without having to devote much time or skill.

Briefly stated, the early offer reform which I urge the Committee to consider would restrict contingency fees in personal injury cases to representations where

real controversy exists between the parties, and where real value-adding services are required of plaintiffs' counsel. Its principal features are:

(1) Defendants are given the opportunity to make early settlement offers, but only if made within 60 days of a demand for settlement from plaintiffs' counsel.

(2) If the early offers are accepted, plaintiffs' counsel fees are limited to capped hourly charges; if the early offers are rejected, contingency fees can only be charged against recoveries in excess of the offers.

(3) If no offers are made within the 60 day period, contingency fee contracts are unaffected by the proposal.

In sum, the proposal neither requires defendants to make early offers nor claimants to accept them, and it has no effect on fee if no offers are made. Likewise, it has no effect on fees chargeable against recoveries in excess of rejected offers. As such the proposal is a self-executing mechanism which, as observed by George Washington University Law School Professor and former Emory Law School Dean Thomas Morgan, one of the country's preeminent ethics scholars, "[allows] the adversaries themselves [to] decide where routine accident claims processing ends and high-risk legal battles begin." It ensures that contingency fees in tort cases will contain the *quid pro quo* described by Justice Blackmun: "[t]he premium added for contingency [which] compensates for the risk of nonpayment if the suit does not succeed."

Finally, the proposal literally *reverses* today's systemic incentives which profit many defendants who adopt intransigent settlement positions and who engage in lengthy and costly depositions for the sake of forcing plaintiffs' counsel to settle on terms less than optimal for their clients. ("Sell out your client and you'll make \$500 per hour. Go for top dollar for your client and I'll see to it that, even if you get it, you'll wind up making \$50 per hour.") Under the proposal, defendants who engage in such tactics no longer gain advantage, for they lose the savings available to parties who make substantial early settlement offers.

The proposal's early settlement, low-transaction cost and even-handed features have, as indicated, gained it the support of a notably broad range of endorsers. My own bias in the proposal's favor as one of its principal draftsmen (along with Professor Jeffrey O'Connell, holder of the McCoy and Class of 1948 chairs at the University of Virginia Law School and Cardozo Law Professor Lester Brickman) may be discounted; a better sense of the proposal's appeal and merits can be seen from the proposal's endorsement in more than 40 newspapers ranging from the *Hartford Courant* to the *Sacramento Bee* to the *Wall Street Journal* to the *Cleveland Plain Dealer* to the *Honolulu Star Bulletin*. When first introduced, the proposal was endorsed by a group of extraordinarily distinguished attorneys including four present and former major university presidents, eight present and former law school deans, two former Solicitors General and past presidents of the American Association of Law Schools, the American Civil Liberties Union and the American College of Trial Lawyers. Endorsers included such known conservatives as Robert Bork, William Barr and Rex Lee, but also included former Johnson Administration Solicitor General, the late Erwin Griswold, former ACLU president Norman Dorsen and, perhaps most notably, Clinton Administration FTC Chairman Robert Pitofsky. In some respects, what is most revealing of the proposal's broad appeal is its recent endorsement by an alliance of consumer activists and businessmen seeking to offer it as a 1996 California initiative. The alliance is led by Silicon Valley entrepreneur Thomas Proulx, insurance critic and consumer author Andrew Tobias and, remarkably, Voter Revolt, the Nader-affiliated consumer group which sponsored California Proposition 103 mandating sharp automobile insurance rate reduction. In 1988, Voter Revolt had also successfully opposed California Proposition 106 which sought to limit attorney fees, but its Political Director, Bill Zimmerman, distinguished the proposal from the 1988 measure in the following, instructive terms:

[T]he attorney fee limits in Proposition 106 were too severe. Attorneys would have refused to take cases under that system which would have limited access to justice for too many legitimate clients. Th[e] proposal is a progressive, pro-consumer measure.

ATLA will of course oppose the proposal as will, predictably, its never-fail spokesman Ralph Nader. But precisely as consumer activists have courageously broken away from Nader to support the proposal, even some members of the trial bar have broken ranks with ATLA to do the same—joining their support with that of medical groups, citizen groups, city administrations such as those of Guiliani's New York and Goldsmith's Indianapolis and key small business organizations. Particularly instructive is the recent speech of Texas plaintiffs' attorney Steven Susman to the Annual Meeting of the American Bar Association Tort and Insurance Practice Section. Susman spoke of the public's increasing tendency to "distrust, despise and denigrate

... the trial lawyers of America." He further argued that trial lawyers "are in danger of extinction unless something is dramatically done now by us," that "nothing seems to have changed for the better [even though] we helped elect the President of the United States" and that "[trial lawyers] are still the target of public distrust." "[W]e can still continue to travel to Washington and our state capitols to lobby for our cause [and] buy our own billboards to praise lawsuit use and the virtues of jury trial," he said, "but the problem is more than a public relations one." Susman spoke as follows about the proposal, which he described as one "which we can adopt quickly and without destroying our adversary system:"

[A] group of influential lawyers and corporate executives . . . went public . . . with a suggestion that would limit the amount of fees a plaintiffs lawyer could get from a quick settlement. . . . While my colleagues in the plaintiffs bar were aghast at the notion that their right to contract with their clients could be interfered with, the proposal . . . is not that outrageous. I do a lot of contingent fee work for large corporate plaintiffs and during our fee negotiations, little is left on the table. Often my clients insist on a fee structure not so different from that being proposed. So what's so awful with a rule that assures clients without clout of the same protection against a lawyer windfall?

Much is at stake in the debate over charging standard contingency fees in all personal injury cases—a practice which violates ATLA's own "recommend[ed]" standards, which defies Justice Blackmun's risk-reward tradeoffs and which, as the *Wall Street Journal* recently pointed out, often results in risk-free fees paid to plaintiffs' lawyers which range from \$1000 to \$25,000 per hour. Much is also at stake in the need to ensure more rapid settlement of tort claims and to end abusive and unethical practices under which defendant advantages are gained by "squeezing" plaintiffs' attorneys. Finally, by increasing incentives for the early settlement of cases, and by radically reducing the transaction costs of cases which are settled on an early basis, *the proposal will also permit sharp reductions in malpractice, auto and comparable insurance rates—on the likely order of 15% to 25% for most of your constituents—and win offer like fiscal relief to generally self-insured state and municipal governments for whom tort payouts have become large and mounting budget items.*

In the end, all consumers and the American economy pay for a system where lawyers' monopoly of access to the courts allows them to impose a 33.33%–40% toll charge on all damage recoveries, even in cases where defendants are willing to pay on a rapid, no-dispute basis.

The beauty of the proposal is that the above savings will result from reduced litigation costs and reduced counsel fees in settled cases. Under the proposal, no claimant rights will be abridged or reduced. To the contrary, claimant interests in more rapid settlements will be enhanced, and defendants who make early settlement offers will save money only because they will have earned the right to pay larger portions of their settlement dollars directly to claimants.

The proposal will put teeth into the paperwork-generating, reporting provisions of Section 104 of HR-10; more importantly, it is an apt, ideally tailored supplement to Section 105 of HR-10. I urge the Committee to make it a part of HR-10, thereby enhancing its role as the Common Sense Legal Reforms Act.

MOORE-GEPHARDT

This reform provision allows defendants who make early offers to assume *the full economic costs of tort claims* as defined by state law to be liable only for costs which exceed claimants' insurance coverage. As such, the provision encourages proffers of what most claimants seek—the right to be made whole following an accident, even for injuries which develop and arise long after accidents have occurred. At the same time it does so while effectively ending the lottery-like, costly *double payment* of medical costs generated by the collateral source rule. The provision authorizes claimants to reject full economic compensation offers of defendants, but requires such claimants seeking non-economic pain and suffering and/or punitive damages to prove *willful or intentional defendant misconduct and to do so beyond a reasonable doubt*. (As is further discussed at page 15 of the statement, pain and suffering damages are largely designed to pay attorneys for establishing economic damage claims, thus making pain and suffering awards particularly inapt when defendants have promptly offered to assume the economic costs of a claim.)

Under the circumstances, Moore-Gephardt will provide large numbers of claimants with *early, hassle-free, low transaction cost settlements of claims*—a matter of particular value to low income claimants who lack the independent resources to wait out the lengthy delays now endemic to the tort system. And, the proposal offers

sharply reduced costs to defendants who offer to make claimants whole for the injuries resulting from their claims, so long as their conduct in causing the injury was not flagrantly inappropriate. This trade-off and the incentive mechanisms it creates elegantly reflects what the overwhelming majority of parties to tort claims, and our economic system as a whole, both want and need.

By effectively eliminating the transaction costs of settled cases, the Moore-Gephardt early offer reform will also lower the cost of settled cases even more sharply than will the contingency fee early offer reform discussed earlier in this statement. Such is the high cost of counsel in low-dispute cases, and such is the cost of non-economic damage awards largely devoted to paying for such counsel, that Moore-Gephardt will produce likely malpractice, auto and comparable insurance rate reductions for most Americans in the range of 20%-40%, and will do so by providing faster relief for most claimants.

A further, extraordinary benefit will result from Moore-Gephardt's early settlement-pain and suffering tradeoff: *massive reductions in health care expenditures now incurred for unnecessary, wasteful and downright fraudulent treatment.* Professor Charles Wolfram's ethics treatise, *Modern Legal Ethics*, is one of a number of authoritative sources which makes the critical point that explains how the perverse incentives created by pain and suffering damage awards sharply drive up the cost of health care for all. Wolfram's point—that "[p]ain and suffering and similar non-monetary damages probably average three times the monetary damages in personal injury claims"—is of profound significance for Members of Congress struggling to contain rising health care costs. A world in which every dollar of health care costs incurred by a tort claimant leads to a cash award to the claimant and his lawyer of three dollars is a world in which tort claimants will utilize health care services unnecessarily, wastefully and often fraudulently—and will do so on a massive basis. And, the fact that health care costs are generally borne by the health insurance system rather than as out-of-pocket costs of tort claimants further serves to ensure that doctor and chiropractor visits by tort claimants will be cost-free and risk-free to them.

In sum, the pain and suffering system works as follows: claimants receive three dollars in tort claim awards for every dollar they get others to pay for their health care visits. Given such a system, it should not surprise the Committee to learn that:

While the median number of visits for neck and back sprain complaints is 2-3 when no tort claims are made, recent studies of Los Angeles County reveal that auto tort complainants with alleged neck and back sprains made an average number of 26 medical visits per claim, at an average work-up cost of \$4000.

The median number of chiropractor visits made by Hawaii auto tort claimants (all paid for by insurance) was an astonishing 58, with 25% of the claimants making 84 visits or more.

When, in 1989, the right to sue for pain and suffering in Massachusetts was raised from a required minimum threshold of \$500 in medical bills to a \$2000 threshold, the median number of health care visits per auto tort claim rose by 131%—from 12 visits per claim in 1988 to 30 visits per claim in 1989.

On a nationwide basis, the number of bodily injury auto tort complaints went up by 16% between 1987 and 1992 even though, during the same period, there was a 12% decline in automobile accidents severe enough to produce a vehicle damage claim.

Attorney involvement with auto tort claims produces a 200%-near-400% increase in health care costs over those incurred by comparably injured claimants who have not retained attorneys.

Other comparable indices exist which reveal how pain and suffering damage claims produce massive and unnecessary health care expenditures at an overall national cost which I believe to be no less than \$12-\$18 billion per year. (Studies of this very issue are reportedly being conducted, and at least one major national study is reportedly on the verge of completion.) Thus, *Moore-Gephardt's salutary effect of trading early and full economic recovery for claimants in exchange for their relinquishment of most of their pain and suffering claims has the ironic effect of making Moore-Gephardt—in addition to its other virtues—one of the most serious health care reforms Congress will have considered in years.*

As with the contingency fee reform proposal, Moore-Gephardt will attract broad interest and support from many parties. I urge the Committee to build on the extraordinary reform model introduced by now-Minority Leader Gephardt, for it provides the means of achieving the most far-reaching reform now available to curb the abuses of our tort system and to make it responsive to consumers.

McCONNELL-ABRAHAM

The contingency fee and Moore-Gephardt early offer reforms described above are included as key provisions of a comprehensive bill introduced last week by Senators McConnell of Kentucky and Abraham of Michigan. If acceptable to the Committee, I would like to attach a copy of McConnell-Abraham to this testimony so as to assist the Committee in determining whether and to what extent early offer reform provisions fit in with and usefully supplement HR-10. In that regard, I urge the Committee to consider the creative approach to federalism issues offered by McConnell-Abraham. Despite the fact that curbing excessive litigation and curbing the useless and fraudulent health care expenditures generated by the perverse incentives of today's tort law make tort reform appropriate for treatment by Congress, and despite the clear burdens on small business and interstate commerce now caused by the rising costs of our legal system, McConnell-Abraham adopts a highly deferential approach to state law. First and principally, the contingency fee and the Moore-Gephardt provisions of McConnell-Abraham leave underlying state tort law essentially unaffected. Thus, decisions as to whether to make early offers, and questions regarding the economic damages due and owing to claimants are, under McConnell-Abraham, wholly governed by state law. The greatest potential impact on state law posed by the reforms—Moore-Gephardt's alteration of the burden of proof required for pain and suffering claims when defendant offers to assume the economic costs of a claim are rejected by claimants—derives from the fact that pain and suffering awards are largely used for the purpose of compensating plaintiffs' attorneys, not claimants. (Professor Charles Wolfram's ethics treatise is again revealing in its extraordinary acknowledgment that "inflated elements of general damages, such as pain and suffering, are tolerated by the courts as a rough measure of the plaintiff's attorney fees.") Thus, when early offers are made to assume the economic costs of a claim, limited justification exists for pain and suffering awards. (McConnell-Abraham also offers explicit deference to state law which establishes minimum recoveries in the very narrow band of cases where severe injuries are not ordinarily compensated with high damage awards.) Finally and despite the above, McConnell-Abraham offers states a *full opt-out right* from its early offer (and other) provisions. In all, McConnell-Abraham is a model for dealing with important questions of federalism, even as to issues far removed from tort reform.

CONCLUSION

Today's hearing is an important, potentially historic one. Having served while General Counsel of OMB as the first Chairman of the Reagan Administration's Working Group on Tort Policy, I have watched tort reform efforts come and go over the past years, and am greatly cheered to think that the time may finally have come for real, systemic, structural and effective tort and civil justice reform. Accordingly, I am particularly grateful to the Committee for giving me the opportunity to set forth my views at today's hearings and stand ready to be of such assistance to the Committee as it deems useful.

Mr. MOORHEAD. Unfortunately, we have to adjourn for another 15 minutes to vote. They're coming about every 20 minutes, 25 minutes.

Mr. Fry, you'll have to wait until we get back.

Mr. FRY. Thank you.

[Recess.]

Mr. MOORHEAD. The committee will come to order.

Mr. Fry, you're recognized for 10 minutes.

STATEMENT OF WILLIAM R. FRY, EXECUTIVE DIRECTOR, HALT—AN ORGANIZATION OF AMERICANS FOR LEGAL REFORM

Mr. FRY. Thank you, Mr. Chairman. It's a pleasure to be here.

I was just saying to someone that HALT, which has been in existence for 17 years, hasn't really had occasion to come up to the Hill until now. We used to sit in the board meetings and wonder out loud if there wasn't some subject on which we could go to the Hill and seek legal reforms. So I am delighted to be here now and

delighted that legal reform is on the agenda. We only hope that when the tort reform consideration is finished that the Congress will turn to many other areas of needed legal reform. We work in many of them on the State level.

One of the great difficulties with legal reform is that professions and systems are not going to cure themselves, and the legal profession is no exception. The legal profession dominates not only in its own corridors and in the judiciaries, but in most State legislatures. We found that getting reform through on those levels is extremely difficult.

Let me say just a little bit more about HALT because I think who we are may be significant to you. There are many consumer groups and many advocacy groups on the scene in Washington, and we are one of them, but I think we're different, and I think maybe if you know what some of the differences are, it would be significant to you.

For one thing, our members range across the professions. They include doctors; they include lawyers and some judges, and a great many small business people, as well as individuals. One of the things that they differ from in other consumer groups is that they are not—they don't view themselves as product consumers; they view themselves as consumers of the legal system, and they are both plaintiffs and defendants. In many cases they are people who have been wounded by the system and want to see a more fair and more just system.

We are not supported by any industry. We are entirely supported by our 70,000 individual members, and the only group that we owe is our members. We owe it to them to speak in the interest of legal reform, but we are bipartisan, and our members are primarily people who have been hurt, have been traumatized by the legal system.

Now going onto the subject of prior notice, I think I end up agreeing in part with both of the former speakers. The prior notice may cause a little bit of mischief. Our first inclination was to like it simply because it would seem to promote early settlement of cases. We think anything that promotes early settlement is likely to be good. To the extent that a defendant has a 30-day opportunity to make an offer, we like the prior notice rule. It has a number of exceptions. I'm not sure that I agree that the exceptions wipe out the rule, and I can see possibility for manipulation, but, nevertheless, we favor the motivation behind it, if it is to obtain early settlement.

On the other hand, we don't think that it goes far enough to achieve that goal. And without going into detail, I think we have in our testimony some suggestions about how a prior notice rule could have an additional provision that encourages and rewards an offer of settlement.

Very briefly, it's along the lines of some of the points Mr. Horowitz made, which is that in a contingency-fee case there could be a cap if there is an early offer. The concept is that a lawyer doesn't begin to earn a one-third or 40-percent contingency-fee case until the case is really in engagement in litigation, and the defendant should be encouraged to make an early offer to settle the case, in which situation, if the offer is accepted, the plaintiff's attorney isn't

entitled to one-third. Now that is just the kind of issue that HALT members care about. They feel quite strongly that contingency fees are driving litigation on the one hand and hurting individuals on the other. The individuals that are hurt are the plaintiffs themselves that have to turn over huge sums of money to their lawyers in what are very often no-risk cases—schoolbuses hit by dump trucks, airplanes that fall out of the sky. These are not contingency cases. The risk of losing is almost nonexistent. The only question is, how much will be paid? And, yet, lawyers continue to insist that contingency fees have to be paid. So we see a cap on contingency fees as part of a settlement.

The other thing we would like to see prior notice do is add the reverse, to reward the early offer. In noncontingency fee cases there is the concept of loser-pays. Now I will mention this in a little more detail in a moment. We don't care that much for loser-pays as it appears in the litigation, but I think a modified loser-pays rule just on the subject of damages could be used as fee-shifting to encourage a defendant.

For example, a defendant in the case makes an early offer of \$100,000. The plaintiff rejects it. If the plaintiff does not recover that amount, or perhaps an amount slightly more than that, the defendant recovers the cost of litigating damages. That's a modified loser-pays.

Let me go on and just touch briefly about a couple of other points in the common sense legal reform that are important to HALT. I mentioned that loser-pays is something that troubles us. I was talking to Walter Olson the other day, who testified in front of this committee on Monday in favor of loser-pays, and I told him that his testimony in favor of it involves so many subtleties and so many nuances that when he was finished, it almost looked as if it was rule 11, the rule that has all the flexibility for punishing parties.

We know that loser-pays is attractive to people. The point was made to me in the intermission that what hurts is a defendant defends successfully and still ends up losing. We think there are a couple of solutions. Loser-pays is too harsh. You've heard plenty of testimony on that, and we simply endorse that. But we think there are a couple of other things you ought to think about.

One of them is that alternative dispute resolution lowers the cost of defending; so that the defendant who is put into alternative dispute resolution and wins hasn't lost as much in legal fees.

The other solution, unfortunately, is probably out of your jurisdiction, but things are happening there, and that is, lawyers charge too much. If HALT members agree, all 70,000 of them, on one thing, it is that statement. Corporations are beginning to find that out, are beginning to bargain and to take bids and to refuse to pay lawyers' fees. So to the extent that loser-pays is an effort to solve an apparent injustice, we think there are other ways to resolve it.

The other subject I wanted to mention is the provision that encourages the States to require lawyers in contingency-fee cases to report to their clients what their hourly charges were. We have been pushing for these kinds of reforms for years. This one I'm delighted to see. I wish that it went further, but let me tell you what I like about it so far.

Clients, and particularly plaintiffs, are not sophisticated about what their case involves, and particularly in serious cases. We, for example, recognize that plaintiffs in airline crashes were almost devoid of information about what they were getting into, and there have been quite a few crashes recently, and you've probably read about the lawyers who rush in; some families are approached by 20 or 30 lawyers who want them to sign up right away, so that the lawyer will get one-third of the recovery. At HALT, we put out a 50-page manual for victims of air crashes and their families. We call it "After the Crash." And it educates them about what they're in for, what they can expect, and what the lawyers can offer them, and this is all because the contingency fee can be such a problem for these plaintiffs. They don't know what they're getting into; they sign up for it. This little rule, if the States follow it, will at least allow plaintiffs to have some information about what they're paying for and what they're getting. And there are cases where the amount of time that a lawyer spends on a case and gets a contingency fee results in tens of thousands of dollars per hour.

Now we believe or we hope that Congress will continue to look at legal reform once the common sense legal reform bill is passed. And I'll wrap this up, Mr. Chairman, and just say that we would be very happy to see additional subjects of legal reform undertaken by Congress in two ways. One is that there is the commerce clause and there is very little in the legal system that can't be subject to the authority of the commerce clause. And the other is that attachments to moneys flowing into the States for the justice system could be used to establish more rules. So, as happy as we are with the fact that there is a beginning, we hope that Congress will keep working on legal reform issues.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Fry follows:]

PREPARED STATEMENT OF WILLIAM R. FRY, EXECUTIVE DIRECTOR, HALT—AN ORGANIZATION OF AMERICANS FOR LEGAL REFORM

I am Bill Fry, Executive Director of HALT—An Organization of Americans for Legal Reform, which is based in Washington, DC, and is national in scope. I am most pleased that legal reform is now on the national agenda and that I am able to testify in Congress on changes aimed at improving the legal system.

HALT is a nonprofit membership organization devoted to reforming the legal system so that it works better for the average citizen. We are funded entirely by individuals, from all fifty states, and count among our members doctors and lawyers, business owners, professionals and homemakers, retired people and those many who have been hurt by the legal system.

Part of the movement for reform comes from concern about the stifling impact the law can have on prosperity and economic growth. But we hope that, for Congress, the plight of individuals trying to use the legal system is also of concern, and that HR 10 will be only the beginning of Congressional action to change the way the legal system functions.

Because of its complexity, expense and dominance by lawyers, the legal system is inaccessible to more than half of the population when they have legal problems. For low income people legal help is almost nonexistent except for the most poor who qualify for Legal Aid. Millions of middle-income people can get no help from lawyers and are denied access to simple remedies because of complex, expensive and intimidating procedures established by the legal profession. When Congress finishes with tort reform we urge it to turn to simplification of the legal system.

Congress in HR 10 is considering steps which, collectively, penalize those who misuse the courts. To the extent that this reduces frivolous or abusive litigation it is to the good. But if litigation is made harder to pursue, Congress should also support alternatives to litigation—mediation and arbitration—which can be simplified

versions of litigation and do not always require lawyer representation. Other changes needed to make the system usable by the average person include raising the jurisdictional amount on Small Claims Courts, putting uncontested matters into administrative forums, and simplifying processes such as child support enforcement, probating estates and getting a change of name. At another time I would be pleased to discuss how Congress might undertake to use its powers to effect these reforms.

One reason we are talking today of tort reform is that the current system has been largely designed by lawyers and their control is based in the state courts and the state legislatures which are susceptible to lawyer influence. Many potential legal reforms are under state laws and Congress has typically deferred to the states. The result has been a nation-wide loss of due process where most citizens cannot use the courts, a burdening of businesses by what is often lawyer-stimulated litigation, and a widespread loss of respect for the rule of law. One branch of government—the judicial branch—is inaccessible in ways that would be unthinkable for another branch. Imagine if Congressional constituents had to pass opaque technical hurdles to comment on legislation, or needed to hire a professional to express their views on the issues. Yet access to the judicial branch is so complex, difficult and expensive that only the wealthy can afford it, and the rules which make it so are the product of lawyer dominance in our legal system.

It is axiomatic that no group will reform itself from within. The legal profession is no exception. It is controlled by lawyers and run primarily for their benefit—they will not voluntarily change it. To the extent that a group of professional lawyers has been given power to deny access to one branch of government, corrective legislation is needed and this situation is a national dysfunction warranting action by Congress.

This subcommittee has heard from a number of legal scholars about elements of HR 10. My testimony comes not from scholarly analysis but from the perceptions of the average consumer of legal services: individuals who must use the system for simple rights such as incorporation, probate, contract disputes and personal injury, which may include prosecuting or defending litigation. While HR 10 is limited primarily to tort litigation, its precepts and principles will reverberate throughout the legal system. If "loser pays" is accepted for federal diversity cases, the states will emulate it. Thus, my comments on elements of HR 10 will take into account how they might work if they became universal.

HR 10's goal is to reduce frivolous litigation by penalizing it, and thereby promote out-of-court settlement and reduce the assertion of marginal claims. The question for consumers is whether it achieves these goals while preserving their basic rights to redress when they need to use the courts. From the consumer's vantage, some of the HR 10 rules will not affect them directly, but promise indirect benefits in lowering the costs society pays for excessive litigation. Consumer want to preserve their access to the courts, and to benefit by restrictions on abusive and costly litigation which, in the end, they pay for.

For the goals of HR 10 HALT is in general support. Our members agree that excessive and abusive litigation must be stopped, and that the unseemly profits lawyers gain from the system are crippling areas of the economy and cheating individuals who use the system.

I have been asked to focus particularly on section 105 of HR 10 dealing with "Prior Notice"—requiring the particulars of a claim and alleged damages be provided to a potential defendant 30 days before filing suit. In this position paper I will also report, in a summary way, HALT's position on other provisions of HR 10.

Section 105 (with exceptions when prior notice would be inappropriate), takes a step against unnecessary litigation by providing potential defendants an opportunity to make an offer of settlement. The burden on a plaintiff to give prior notice seems minimal since the statute of limitation is tolled and failure to deliver prior notice results in dismissal with the right to recommence the case.

Encouraging settlement is of consumer interest since the costs of litigation are ultimately passed on to consumers. However, section 105 takes only a small step in this direction. It is rare for a potential defendant to be unaware of a claim and there is often ample communication between the parties prior to suit so that litigation is not a surprise. It is desirable to require the claimant to be specific on the claims and damages prior to filing suit (section 105 is not articulate on the point, but the notice should presumably be in the form of a pleading, with claims stated separately and damages tied to specific losses). This permits the defendant to better evaluate the claim. But there is no reason to think this faint effort to encourage settlement, without more, will have a dramatic impact on the numbers of cases filed. It provides no incentive to settle and no penalty for failure to negotiate in good faith.

To consider how to motivate parties to settle we should distinguish between contingency fee (tort) cases and other cases. For contingency fee cases several com-

mentators have proposed that when a plaintiff declines an offer the plaintiff's attorney can only collect a contingency fee on the excess amount of the final award over the offer. When an early offer is made the plaintiff's attorney can charge only an hourly rate (capped at 10%) for pre-offer labors. This makes reasonable settlement attractive to the plaintiff who saves attorney fees, and to the attorney who sees a reduced chance for reward through continuing to litigate.

This proposal assumes that the defendant has sufficient information on the claim to make a reasonable offer, and opens the possibility that a plaintiff's attorney will see to it their opponents do not have such information. This could induce a low offer which could be rejected, preserving the attorney's contingency fee upon a large ultimate award. But one should not assume attorneys will act merely out of self interest and the proposal is worthy of testing.

For cases not involving contingency fees a different incentive is needed. In part an incentive exists by requiring the plaintiff to compensate an attorney for trial work, which is notoriously expensive. Nevertheless, some see this penalty as an insufficient goad to settle. It is in the plaintiff's power to burden a defendant into defending against a claim which should rightfully have been settled; this is unfair to defendants and it is said that if plaintiffs have to reimburse for this cost, it will promote early settlements.

While HALT opposes the "loser pays" rule in HR 10 as being overly harsh, we recommend a variation of that rule to focus a plaintiff's mind on the merits of settlement. In cases where damages are an element, the issues of liability and damages are separate. Since a defendant who offers to settle is free to contest liability in court, that liability issue should be litigated under the American rule against fee shifting. But on the issue of damages the onus should be upon the plaintiff to exceed the offer of settlement, and the defendant ought not bear the cost of contesting the amount originally offered. Under current rules, defendant gets no remedy if a decent offer is rejected.

Where a settlement offer has been rejected it would be equitable for plaintiffs to have the burden of paying defendant's attorney fees for litigating damages, unless the plaintiff's award exceeds the original offer by a significant amount. What that amount should be I am not prepared to say, but it might be in the vicinity of 20%. Thus, if the defendant's offer of \$100,000 is rejected, the plaintiff will need an award of \$120,000 to avoid a penalty for making the defendant litigate damages. That penalty could be the costs of litigating the damages dispute—a partial "loser pays" penalty.

If plaintiff turns down an offer and subsequently loses on the issue of liability, there would be no penalty to plaintiff since damages are not litigated.

In cases where the relief sought is not monetary, offers of settlement may be made to avoid litigation, and should also be encouraged, but the absence of a money stake is in itself a motive to avoid the expense of going into court. We suggest that for the time being such cases should be left to the marketplace to encourage settlement.

Before ending discussion of prior notice, I point out that the requirement of arbitration can produce a result which falls, in expense and complexity, between out-of-court settlement and litigation. For example, HALT recommends that medical malpractice cases below \$100,000 in monetary damages be sent to arbitration (with exceptions for disfigurement, disability or death). If Congress decides to require arbitration for cases of relatively low-level claims, and specifies that the arbitration will not become as technical as a court trial, we would support it.

A step in the right direction would be to permit parties in arbitration to be represented by qualified non-lawyer experts—a provision which building contractors and small businesses would applaud.

In what follows I will give a summary of HALT's views on other elements of HR 10. HALT members do not want to make access to legal rights harder than they now are for the average citizen—and access is already terribly hard. For example, it is often enough punishment for citizens to pay their own attorneys. The "loser pays" rule makes the burden worse. Litigation is chancy and good-faith claims can lose. Paying a lawyer \$150 an hour and possibly losing is already inhibiting; many people forgo suing or defending a claim because of that cost. The added risk of paying double attorney fees will be too much for most people to bear.

The virtue of the proposed HR 10 legal reforms is in their aim to forestall unnecessary and abusive litigation and reduce excess profits to attorneys. These reforms must be tempered so as not to preclude legitimate claims. We present our recommendation in the spirit of finding this balance.

For brevity, we will limit our comments to those areas of the reforms which raise problems. Our positions will be summarized under each of the headings of HR 10, and we will not attempt to lay out reasons for supporting a provision—but will ex-

plain our reasons where we recommend changes. Our short summaries of the sections are only to identify the general scope, not to explain the precise coverage of the proposed changes.

TITLE I—COMMON SENSE LEGAL REFORMS OF 1995

101. AWARD OF ATTORNEY'S FEES

In federal diversity cases, the prevailing party shall be awarded attorney's fees, up to the amount of the loser's attorney fees, unless the court determines that it would be unjust.

Federal Rules of Civil Procedure already permit assessment of penalties against parties or lawyers for frivolous and abusive submissions during litigation. Rule 11 of FRCP punishes such conduct at the discretion of the judge, and the judge is in a good position to evaluate the conduct.

The proposed "loser pays" rule falls on the losing party regardless of whether the claim was frivolous. Litigation is risky and no one can pre-ordain whether a good-faith claim will prevail. Moreover, the decision to proceed, for individual claimants, is often based on the advice of an attorney since few non-lawyers can predict how a case will end.

This rule penalizes the parties rather than the lawyers. It punishes good-faith claims and frivolous claims alike. It will deter access to the courts for those who are not wealthy enough to take the risk. It is reported in England that the rule has, in fact, resulted in courts being accessible only to the rich (Economist magazine).

In Europe, where the loser pays rule prevails, the legal system is different from ours. For example, litigation insurance is common. Homeowners and many others are insured for the costs of litigation, provided the insurer decides that the claim or defense is reasonably likely to prevail. This mutes the fear of the "loser pays" rule but unfortunately America has no such system of insurance. It is dangerous to compare the English rule with the American rule unless we are prepared to shift our entire legal system to emulate theirs.

No one can count on winning even with a good claim. A rigid loser pays rule results in people avoiding litigation unless they have the resources to absorb an unexpected defeat. But frivolous suits are not currently risk free. Judges have many ways to punish frivolous or abusive behavior, ranging from fines and costs to dismissing a motion or a suit. In federal courts, judges have conferences with parties to weed out the frivolous and focus on the real issues. They can reject a bad claim or a foolish defense, and at every step of litigation they can intervene to prevent abuse. Many viewers wish they would intervene more than they do, but they have the power to stop abuses and we should hesitate before replacing their discretion with a rigid mandate.

HALT opposes the loser pays rule as defined in section 101, and also where it appears under Title II of HR 10 for stockholder suits. We reserve judgment on whether a tempered version of the loser pays rule could cure our objections.

If a loser pays rule is adopted it is unclear how it would work and further information would help. We suggest that if it is to be tried it should be tested in several federal districts. Most diversity cases are tort suits; the impact of this section could be to redirect plaintiffs into state courts to avoid the risk of loser pays. There is no data on how the rule would affect the behavior of parties. Before making it national, we should know more.

102. HONESTY IN EVIDENCE

Expert testimony must be based on scientifically valid reasoning; an expert's fee cannot be contingent on the outcome.

HALT has no expertise on questions of admissibility of scientific evidence and takes no position on this proposed rule, while noting that it has no apparent impact on consumer interests. We oppose junk science and also oppose opinion evidence masquerading as expert testimony and note in passing that HR 10 does not address the latter problem.

103. PRODUCT LIABILITY REFORM (SETS RULES FOR BOTH STATE AND FEDERAL COURTS)

(a) Product seller liable only if negligent, or gave a warranty, unless the maker cannot be sued

Retailers are typically sued along with manufacturers and have to defend, but only 4% are found liable. This section protects retailers from suit unless they know of the defect, were negligent, gave a warranty, or the manufacturer cannot be sued.

Given those limits, it is not unreasonable and is not anti-consumer. HALT supports this reform as generally fair to retailers and not unduly burdensome to consumers.

(b) Punitive damages in product liability suits in federal courts limited to the greater of three times the economic damages or \$250,000, and a finding of actual malice (meaning "flagrant indifference")

The purpose of this proposal is to limit "excessive" punitive damages, which have the effect of enriching the plaintiff (and in a contingency fee case, plaintiff's lawyer). It is a widespread perception that such enrichment is not in the public interest, and that excessive penalties are harmful to business and to consumers of products when price reflects the risk of such penalties.

Consumers have two interests in this subject (1) to deter wrongdoers from marketing harmful products, while (2) not burdening consumers with the pass-through of the cost of excessive punitive damages. The challenge is to locate a rule which achieves (1) and minimizes (2).

One issue raised by this proposal is whether capped punitive damages diminish a wrongdoer's risk to a point where there is little deterrence. A manufacturer or seller might compute the risk of 3-times actual damages and find it acceptable. If only monetary punishment deters misconduct, this is a serious objection.

We note that anti-trust penalties have always been limited to 3-times actual damages and seem to work as a deterrent. For most defendants the stigma of punitive damages motivates reform. Excessive punitive damages generate appeals and are often overturned. Washington state and Canada have no punitive damages and there is no evidence that product liability suits there do not achieve changes in conduct.

Grave wrongdoing usually produces substantial harm (e.g., Dalcon shields, asbestos) and punitive damages can, in those cases, be large even with a 3-times cap. In addition, the proposal places no limit on pain and suffering damages which in egregious cases may be substantial. This serves to increase the actual damages amount from which the punitive cap is computed.

It is anomalous that a wrongdoer whose conduct goes past the line into criminal conduct is not exposed to enormous criminal damages, even though their purpose is to deter. Criminal fines are normally much smaller than civil case punitive damages (e.g., assault penalties might be \$10,000); it can be argued that civil penalties should bear some relation to criminal penalties.

In sum, HALT supports the limit on punitive damages for manufacturers and sellers of products. We reserve judgment on such limits for other forms of litigation.

We are, however, concerned that plaintiffs and their lawyers are paid the punitive damages awards. That lawyers should be reimbursed for the extra effort of proving punitive damages is fair, but if plaintiffs are reimbursed actual expenses plus pain and suffering, their pocketing of punitive damages does not serve the public interest.

Without the motive of gain, lawyers may not pursue punitive damages even when they are justified and we would leave their reimbursement intact, whether by hourly fee or contingency fee. But the surplus of punitive damages should go to a fund to benefit the public. At this point we will not propose a rule for how the public interest is to be served. Examples of punitive payments to a public-interest cause exist and should be studied to consider how punitive awards could best be directed.

(c) Noneconomic damages limited to proportionate responsibility

This rule makes a defendant liable only for a proportional share (based on degree of fault) for punitive damages, mental distress and pain and suffering. The rule makes sense for punitive damages which are meant to deter. A defendant who is 25% at fault should not have to pay punitive damages meant to deter another defendant. The logic does not apply, however, to mental distress and pain and suffering damages which are real damages although considered "noneconomic." For some injuries, a lifetime of suffering and loss can only be compensated by a "noneconomic" award, and the plaintiff should not be deprived of this because a co-defendant cannot pay its share. This would be akin to making actual damages only proportional, puffing on the plaintiff the risk of collecting from multiple defendants.

104. ATTORNEY ACCOUNTABILITY

(a) Gives a "Sense of Congress" that states should require attorneys in contingency fee cases to disclose to clients the actual services and hours spent

The supposed purpose is to reveal to a client when a contingency fee is out of proportion to the work done. This can be helpful information for legal reform, but the

proposal contains no indication of how a client is expected to use this data. The American Bar Association in a recent unfortunate ethics opinion declined to say that contingency fees out of proportion to the work done are a violation of ethics, so it is not likely that a client has any recourse unless there was a contract of employment with the lawyer providing relief for this event. Such contracts are virtually unknown.

HALT supports this proposal for its potential value to clients in negotiating fees and the general value to legal reform in exposing the bonanza to lawyers which contingency fees can be.

We urge Congress to consider going further. Lawyers should inform clients in all cases of the work anticipated to be done and goal of the service, or the amount of recovery expected. In contingency fee cases the disparity between work and reward will be open to negotiation. In other cases there is often a similar disparity. Statutory fees for probating an estate are, in many states, set at 5% or more, resulting in windfalls to lawyers whose only task may be to put a \$300,000 house on the market. It is in the public interest that such disparity be put in the open.

HALT recognizes that Congress is not, at this time, going to undertake major legal reform in areas other than those currently proposed. We urge that Congress view their current reforms as only a beginning. If they are enacted, it will be time to consider other reforms which go to cure the inaccessibility and excessive costs of the system.

(b) Amends Rule 11, FRCP, to require penalties for frivolous or abusive litigation conduct, which shall be in an amount to be both a deterrent and compensatory

Rule 11, governing civil procedure in federal cases, now permits a judge to penalize frivolous or abusive tactics in litigation. The proposed change makes the penalty mandatory (as Rule 11 was pre-1993) and adds the requirement that it compensate the other side for costs.

The Rule does not specify who pays the penalty (lawyer or party) or who receives the award. For Rule 11 to be effective as a deterrent and fair as a penalty, payment should fall upon the person at fault. Individuals in litigation are often guided by their attorneys while corporations have the knowledge to direct their own litigation strategy. The courts should assign, or allocate, penalties under Rule 11 based on whose decision it was to engage in the abusive or frivolous conduct.

Penalties in deterrence should be paid to parties rather than the court, to give incentives to pursue penalties.

In favor of this change is that it heightens the danger of frivolous suits by making penalties mandatory and includes compensation as well as deterrence. The question is, will this Rule change cause harm to consumers?

Consumers often bring novel suits testing the bounds of the law, creating new rights or over-ruling old precedents. It is part of the history of consumer law that old rules need to be modified. Yet, a plaintiff who brings such an action is open to the challenge that the precedents are clear and the suit frivolous.

HALT is reassured by evidence that judges have not used Rule 11 to penalize innovative legal claims. It would be reassuring, however, to add a provision specifying that suits filed to overturn precedent are not, per se, frivolous (using the example of *Brown v. Board of Education of Topeka*). Rule 11, if used vigorously, supplants the need for a "loser pays" rule since it permits imposition of attorneys fees; and is superior to "loser pays" by giving discretion to judges for surgical application of the rule to fit the offense rather than the bludgeon of "loser pays." But to the extent that judges are to make greater use of Rule 11, we recommend specific protection for innovative litigation.

Rule 11 can put a wedge between client and lawyer. When a Rule 11 sanction is threatened, it can fall on either the party or the lawyer. This can result in finger pointing for blame. A lawyer may wish to avoid a Rule 11 charge through caution while the client insists on forging ahead with a far-fetched claim. Thus, the Rule can have the unintended effect of hurting the lawyer-client relationship. Strengthening the Rule will exacerbate this problem. This dilemma is beyond the scope of our discussion of HR 10—it belongs in an analysis of the ethical obligation of lawyers to accept direction from clients. We mention it here to suggest that ethical rules for lawyers may need revisiting if Rule 11 is strengthened.

105. NOTICE BEFORE CIVIL ACTIONS

Requires particulars of a claim and amount of damages alleged to be sent to defendant 30 days before filing suit

We discuss this proposal at the beginning of our paper.

106. HOUSE COMMITTEE REPORTS

Requires House committees to report whether a bill precepts state law, is retroactive, creates a private cause of action, or impacts on federal agencies

HALT supports this change. The absence of this information in legislation is a source of confusion and endless litigation.

107. BILL IS TO BECOME EFFECTIVE 6 MONTHS FROM ENACTMENT

HALT has no position.

TITLE II—PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995

201. TITLE AND TABLE OF CONTENTS

(Amends the Securities Exchange Act of 1934.)

202. PREVENTION OF LAWYER-DRIVEN LITIGATION

Requires guardian ad litem or steering committee for stockholder in class actions, to direct the lawyers and review offers of settlement

203. PREVENTION OF ABUSIVE PRACTICES THAT FOMENT LITIGATION

Plaintiffs must have 1% or \$10,000 in stock. The loser shall pay opponents attorney's fees

204. PLAINTIFFS MUST PROVE ACTUAL KNOWLEDGE OF FALSE STATEMENTS

205. FUTURE PREDICTIONS HAVE A "SAFE HARBOR"

206. PARTIES MAY AGREE TO ALTERNATIVE DISPUTE RESOLUTION

207. RICO ACT DOES NOT APPLY

HALT's position on Title II contains several objections, but should be prefaced by the observation that stockholder class action suits have been shown to be an area of unbridled abuse by a few lawyers. We support the effort to stymie those lawyers and, except for our objections below, support the goals of Title II.

The loser pays provision of Title II suffers from the same objections we expressed about loser pays under federal diversity suits, explained above.

The level of proof required for stockholder actions departs from the usual concept of negligence and demands proof of what is virtually an intentional violation of the law. This stratagem is not tailored to the abuses which Title II aims to correct and it cuts into all stockholder suits. The problem with abusive stockholder class actions is not that claimants lack proof of intentional violations of law, it is that they have no basis to allege even mere negligence. They file suit because the stock value has changed; they allege misconduct; they plan to settle for nuisance value. The problem will not be resolved by creating a higher level of proof, although it might help. But, while it helps deter scam suits, it also hurts legitimate suits.

A casualty of this approach is proportional liability. When intentional harm is the measure of liability every defendant is liable for the full amount, while proportional liability—a basically fair concept—is trashed because under the rule of intentional harm everyone is fully liable. This is raising the liability barrier too high for legitimate claimants in the hope of curtailing a sub-group of opportunistic claims.

This demonstrates, as well as anything, the difficulty of Congress trying to regulate lawyer misconduct by indirection—through creating a filter which only legitimate claims can pass. Congress might do better finding a way to regulate selected aspects of the legal profession just as it regulates communications, toxic waste, and health care.

We suggest that the motive for lawyers to pursue weak claims in stockholder class actions suits resides in the contingency fees derived from such suits. That is a wedge for an attack on such cases, not raising the level of proof, which hurts legitimate claimants as well as opportunistic ones. Capping contingency fees when there is an early offer and penalizing a refusal to settle might dissuade some lawyers from filing suit.

The opportunistic stockholder suit says the stock value changed and there must have been misrepresentation by the company. The legitimate claim cites the mis-

representation as the basis for the suit. The difference is the degree of specificity as to the misrepresentation. A solution might be to require the plaintiff to allege, with reasonable detail, the erroneous statement by the company. This cure focuses on the pleadings, instead of changing the level of proof which burdens legitimate claims equally with phony claims.

Title II needs work before it can achieve the goal of excluding nuisance suits while preserving valid claims.

Mr. MOORHEAD. Thank you.

As you probably heard, we've had two bells again. This is the motion to recommit, which usually precedes the final passage of legislation. I think that we'll probably be voting twice, but we'll be relieved of this interference by the time we get back. I think these should be the last votes we have for a little while, and I think our panel will be able to complete their work before there's another interference after this one.

Mr. HOROWITZ. Mr. Chairman, when do you all eat lunch?

[Laughter.]

Mr. MOORHEAD. You don't worry about lunch when you work in Congress. If you get a bite here or a bite there, you're lucky. The same thing for dinner here, too, lately.

[Laughter.]

Mr. MOORHEAD. We'll be back in probably about 20 minutes.

[Recess.]

Mr. MOORHEAD. I certainly want to apologize to the witnesses for the delays that you've had to go through today, but it was certainly not planned.

One of the things that you discussed, Mr. Fry, was that you thought we could have adjustments in contracts for attorneys who have taken litigation on contingency. I practiced law for a long time, and most of the lawyers, 90 percent of them really do a great job and they try awfully hard, but there's a certain number of them that don't, if you've noticed.

I just wondered if you had a provision in the law that required a lesser fee if cases were settled prior to coming to the end of the trial, if you wouldn't get some of these people just dragging it on all the way. Now I know some contingency contracts do differentiate between those cases that are settled before trial and those that go to trial. That's the 25 percent to 33 percent. But I just wondered what you think would happen.

Mr. FRY. Well, I think you're correct that if a full contingency fee, let's say 33 percent, is available simply by declining offers and going to trial, there is a temptation for the lawyer to do that. That's one of the reasons we tend to like the early-offer proposition which says that it's only for the value-added that a lawyer gets a contingency, if they turn down an early offer. We think that tends to solve that problem.

I mentioned the loser-pays earlier on as a possible add-on to the prior notice to make it more effective, to give it teeth, but I think, in truth, we would like to see that kind of a rule spread across all contingency-fee cases.

Mr. MOORHEAD. You know, I've heard from opponents of tort reform that the current system should be preserved because it adequately and justly provides compensation for injured consumers. But, as currently structured, many times the system fails to actually accomplish its objective. This is costly and inefficient. The

transaction costs are very high and in most instances unnecessary. The prime and constant beneficiaries seem to be only the trial lawyers and not the plaintiffs in many instances.

Do you have any comment to make on that?

Mr. FRY. Well, I must say that, speaking for the members of HALT, that is a widespread feeling. There is a sense, for example, that tort cases are no longer as risky as they once were now that contributory negligence is essentially out of the way. Having removed that and having so many cases where payments are going to be made without—almost without protest, we think that adhering to the contingency fee simply enriches lawyers and is an anticonsumer proposition.

I know that's a generalization, but there is data, for example, showing that clients with small claims tend to get underpaid; clients with bigger claims tend to get overpaid. If I had to speculate why that's true, it's because the lawyers are taking the big claims and inflating them and not taking the small claims.

Mr. MOORHEAD. Do you have any comments on that, Mr. Weiner?

Mr. WEINER. Well, yes, I guess I do. First of all, I think the contingent-fee system has some problems in it, and Mike has addressed—Mr. Horowitz has addressed some of those that may be solutions, but overall the contingent-fee system does a lot of good for people who are injured. And whether they're the small—people who have small injuries or large injuries, or somewhere in between, in order to be able to hire an attorney to represent you for "no cost" except for a share of your award is something I think is beneficial to our society. I know others would disagree with me and think we shouldn't have a contingent fee, but I think it's worked well overall. I think we should maintain it and we should try to make it work better, if that's the need.

I'm surprised a little bit of what Mr. Fry said about not being able to find attorneys. You know, in most communities around the country there are probably too many attorneys rather than too few.

Mr. MOORHEAD. I think, you know, I would agree, though, that if you didn't have the contingency system, if the case was a—people wouldn't have the money to hire an attorney in many instances.

Mr. WEINER. That's absolutely clear, Mr. Chairman.

Mr. MOORHEAD. And if they—if they didn't, unless the case is pretty certain, a lot of lawyers wouldn't really want to waste their time on it.

Mr. WEINER. Yes. It's interesting. The marketplace is not the same today in 1995 as it was 5 or 10 or 20 years ago. There are lots of attorneys who will take what you would think, we'd normally think of as a contingent-fee case on a non-contingent-fee basis, as long as they feel comfortable that the case is one that they can get some kind of fair compensation for.

You don't—you know, if you're an accident victim in one of these so-called, you know, absolute liability cases, although I've seen those blow up, too, you can find attorneys who will work for you without a contingent fee. And you've got to remember that alternately—you see numbers up to 50 percent; that's not my experience, but let's say that 30 percent or 35 percent goes to the attorney ultimately when you count in the cost and everything. The other part goes to the victim, and, hopefully, the attorney has

added some value to that. That's certainly the case in my experience. Good plaintiff's injury lawyers add value to their client's claims because they know how to make the case as sure a liability case as possible, and they present the damages in its most effective and thorough way. I think the clients get a good deal in that situation.

Mr. MOORHEAD. Mr. Horowitz, the issue has been raised that the section on prior notice should contain an exception to protect documents that may be destroyed or altered if a potential defendant is given 30 days prior notice before suit is filed. In your opinion, is such an exception necessary?

Mr. HOROWITZ. Yes, I think probably so. It makes sense.

Mr. MOORHEAD. Do you all agree to that?

Mr. WEINER. I think it would be advisable, if you're going to have a prior notice statute, that you have some rule like that.

Mr. MOORHEAD. Mr. Weiner, I'd be interested to see your reaction to Mr. Horowitz' contingent-fee reform proposal, where if an early offer is accepted, plaintiff's counsel fees are limited to capped hourly charges. However, if the early offers are rejected, contingency fees can only be charged to get there coveries in excess of the offer.

Mr. WEINER. I think it's an interesting proposal. I've read a lot of the articles about it. Michael and I have debated it on other occasions and in other forums. I think there's some merit to it. I think there's some problems with what they have, but I think it's worth at least looking at.

I have some problems with it in a sense that, how do you deal with the attorney who really is the better attorney? And, I'll just—I'll use an example that Congressman Hoke will relate to in Cleveland. We have some outstanding plaintiff's injury lawyers in Cleveland. Craig Spangenburg is no longer practicing, but did for years and years, and Congressman Hoke shakes his head affirmatively. This man was an outstanding attorney. Now, you know, are you going to cap his fee at a certain amount or are you going to say he's going to get more? Because if you hire Craig Spangenburg in Cleveland, you're going to get a better award 99 times out of 100 than if you hire Joe Doe. I mean, that's just a fact of life.

And if that can be accommodated and there's a system that the people can be fairly compensated, I think Mr. Horowitz' system is worth looking and we should take a harder look at that.

Mr. MOORHEAD. Mr. Fry.

Mr. FRY. I would be inclined to agree with that. I think HALT supports Mr. Horowitz' proposition in its general terms and would want to see some more details. I'm a little bit concerned about the details because we hear stories—I heard one recently of an airline crash in which the lawyer presented a plaintiff with an early offer settlement of \$200,000 and advised accepting it. The plaintiff went to a group of families of victims of airline crashes, a nonlawyer group that got together for comfort originally and, finally, to fight with their lawyers. This group advised the person not to accept it. A subsequent offer of \$600,000; again, advised them not to accept it. The final offer, \$1.4 million. Now I don't know how the Horowitz rule would work in such a situation, and I'd want to find out before I would endorse it.

Mr. MOORHEAD. Mr. Hoke, you're recognized for up to 15 minutes.

Mr. HOKE. Thank you very much, Mr. Chairman.

I think I'd like to ask Mr. Horowitz, since we were just talking about those things, to respond to both what Mr. Weiner said and what Mr. Fry said.

Mr. HOROWITZ. Well, first, on the question—there's no question but that a good lawyer in a case will cause the other side to take a more sympathetic look at the other side's case. That's true in contingency-fee cases. It's true elsewhere.

Mr. HOKE. Well, how does your early-offer—how does your early-offer proposal—

Mr. HOROWITZ. Well, we do two things. The first is we can differentiate under our proposal between lawyers because the Spanglers and Hokes—

Mr. HOKE. Spangenburg, for the record.

Mr. HOROWITZ. Spangenburg, I'm sorry.

Mr. HOKE. Craig Spangenburg.

Mr. HOROWITZ. And the Hokes and the Goodlattes can charge much higher hourly rates, and that's the way the differentiation ought to take place. So you are still capped at your 10 percent, which seems to me to be quite a generous cap on, say, the first \$100,000, and 5 percent beyond that, but it's against hourly rates. And, the good lawyers get the big cases. So 10 percent and 5 percent of millions of dollars in settlements leaves an awful lot of money on the table, and that money and the differentiation between lawyers can take place in terms of the hourly fee they charge.

But there is a larger issue that's posed there. All of us who have been reasonably good lawyers have had fantasies about cases going on forever and keeping our kids' orthodontia bills paid from those cases that walk in, and then the other side looks and says, oh, my goodness, here's Goodlatte on the other side; I'd better settle. That happens on an hourly basis; it happens elsewhere. It's part of the burden, the hazard, and in some respects the glory of being any kind of professional. You always have that kind of conflict of interest with your own client, and we resolve it some of us better, some of us worse than others. There is no way of erasing that.

But I do say that in the example that Mr. Weiner just cited, the good lawyer can say, "I will charge, as against those early offers, \$500 an hour." Other lawyers will charge less, and that will be, clearly, one way of differentiating in the return that lawyers get based on the reputation, on their reputation. So you can be compensated in some measure for your reputation, but to be a good lawyer is always to scare the other side and to get better outcomes for your clients. Those lawyers will get more clients. They will bill more hours.

But I don't think, when there is no risk in the case—that is to say, the money is out there right on the table—that the standard contingency fees are even remotely consistent with the lawyer's fiduciary obligation to his client. There ought to be, as Mr. Weiner said, real risk that accompanies a contingency-fee case. That's the tradeoff that makes it ethical.

Mr. HOKE. I'd like to talk a little bit about the loser-pays provisions in H.R. 10 and the—10? Yes, OK—and some of the early offer provisions that we've—for example, the one—the couple now that Mr. Horowitz has described. And I'd like your opinion, Mr. Weiner, as to which—if what we're trying to do is create disincentives for spurious lawsuits to be filed, if that's really what's going on here, and if we accept the proposition that because we've created a monopoly in terms of being able to have admittance to the bar, so that the bar—and we're all—most of us are lawyers here, I think—but that we have this monopolistic hold on access to the courts, and, therefore, there's a justification for regulating the way that law is practiced, and that has much to do with the civil rules. Then—and we perceive that there is, in fact, a problem here with too many lawsuits having been filed, and not so much—I shouldn't say too many lawsuits, but too many lawsuits that shouldn't have been filed being filed, and with a skyrocketing incidence of litigation, and the problems we have in a broad spectrum of areas in our society as a result of them. They go from commercial transactions to the costs of—the additional costs of manufacturing, to the disincentives and the impediments that are created for research, new design, development, things like that. We've heard a lot of testimony on these things.

And then, finally, even to areas of municipalities where it's hard to get some municipalities to allow their local little leagues to use the ball fields, and I just heard testimony—or not testimony, but I heard evidence yesterday from the director of the Girl Scouts in Washington, DC, who said that they've got to sell 87,000 boxes of Girl Scout cookies in order to cover just the cost of their liability insurance for this district for the Girl Scouts, and that they no longer have horseback riding; they no longer rent cars, and they have—it's changed the way that we do things in America.

If you accept that there's a problem that needs to be fixed, which I do, and if you use that as a basic premise—I guess my question is this: analyzing the loser-pay provisions, do you think that that's the solution? Is that going to move us in the right direction, or is some form of early offer with restriction on contingent fees more the right direction?

Mr. WEINER. Well, it's a broad-based question. Let me see if I can parse it out a little bit.

First of all, the statistics—and, you know, I guess lawyers are good at using statistics for whatever argument—don't seem to support that there is a huge increase in cases. In fact, I think the statistics show pretty clearly that the lawsuits are going down or at least staying level. So that we're not having a whole lot more people filing lawsuits or a lot more. I think a good article on that was this recent U.S. News & World Report that pulled all these together.

So I don't think, Congressman, we have a much more difficult problem than we've had over the last decade or so, but there's no doubt that everyone is concerned about the system and whether it's working effectively or not. I would say to you I think that most of the concern goes around the two issues of cost and time to resolution. People are concerned about how much it will cost to have a lawsuit litigated and they're concerned how long it takes.

I think if you could get people to get their—I think we want to encourage people, if they have a dispute, to bring it to court rather than, as someone said this morning, you know, use some out-of-court method to resolve that problem, because the courts are a good arbiter of disputes.

If we can deal with the cost problem and the delay problem, I think we will have achieved something. I don't think loser-pay, for example, as it is in House bill 10, will deal with the cost problem because I think what it will effectively do will keep people out of the system who have legitimate claims, but are worried about having to pay not only their own attorneys, but the other attorneys' fees if they lose. Yes, it probably will have a few less lawsuits, but those people will be just as disgruntled as people are today with the system because it takes too much cost and too much delay. I'd rather look at things like case management. I'd rather look at ADR. I'd rather look at having more people in the courts who will help get cases settled more quickly. I'd like to look at having report cards for judges. That sounds sort of silly.

Mr. HOKE. I think that we, though, believe that the litigation explosion—and I will grant you that it hasn't exploded over the past 10 years, but that the way that I look at it I think is more instructive as to compare it to our number of cases per capita versus in Europe or in Japan, and that's where you see that we are just—we're out of sight in comparison and where the costs are much, much greater. It's not so much the litigation cost, but product liability cost, tort costs generally, and the impact that that has. That's more my concern.

But I think that your—my suggestion is the reason that we've got the problem is because we've created an incentive for litigation that doesn't exist in other parts of the world, and that's my greater concern. So maybe we're starting with a different premise, but I'm wondering if you think that loser-pays will do anything to reduce that incentive.

Mr. WEINER. I don't really think it will. Maybe on the margin, on the very margin. I think it will create a lot more difficult—it will make it, one, harder to settle cases because you'll have this extra cost involved. When the lawyers sit down and try to settle the case, the conversation will say, wait a minute, you know, I'm out \$10, but you've got to pay my fees of \$7, too, or \$3, you know, whatever the number. So you've got that extra element. It will make cases harder to settle, which is not good; we want cases to settle, because there's that extra element.

Then you've got this whole question of who is the loser in a loser-pay. I file a lawsuit. I ask for a million dollars. The defendant comes back and says, "I'll pay you \$500,000."

Mr. HOKE. And you accept it and then who's lost? I mean, clearly, you—right—

Mr. WEINER. Well, but let's say, no, no settlement. Let's say you go to trial.

Mr. HOKE. Oh, OK.

Mr. WEINER. Let's say you go to trial and you win \$300,000. The jury comes back and you win. Are you the winner?

Mr. HOKE. Yes.

Mr. WEINER. Are they the loser? I would say they're the winner and you're the loser, but this statute doesn't say, and that will be—there will be endless litigation. I mean, as much litigation as we've had over rule 11 as it was before 1993, we'll have tons more over who the loser is. Or do you parse out each issue? If you files even claims and you go to the jury on five of them, and you win those five and you lose the other two, are you the winner or are you the loser?

Mr. HOKE. Well—

Mr. WEINER. You're going to have endless arguments over that. That's why it's not a good system for us to try to adopt.

I think you want to look at things that are going to reduce the cost, transactional cost, and the delay. You've got to look at each one of these issues and say, "Does it reduce the cost? Does it reduce the delay?" If it does, go for it. If it doesn't look for something else.

Mr. HOKE. Yes, and that's what you said; there was a recent interview in CEO magazine that you indicated that you thought was excessive transaction costs which really were the larger problem in the system, but it seems to me that this benchmark of the early offer benchmark that is created in the contingent-fee reform that Mr. Horowitz is talking about is a very powerful way of restraining the abuse of the system. Would you agree with that?

Mr. WEINER. I don't think it's very powerful. I think it has the potential for being a plus in this system. The problem I still go back to is, how do you compensate the very good lawyer who increases—if I hire a good lawyer and that lawyer gets me a \$2 million settlement, and I hire a weak lawyer and they get me a \$500,000 settlement, that's not fair to the good lawyer because of his experience, her experience, her ability to try a case, her ability to win; you're capping her—you're capping not only her recovery; you're capping the client's recovery.

Mr. HOKE. Well, rather than me argue with you about that, I'd like to ask Mr. Horowitz how she would be more fully compensated.

Mr. HOROWITZ. Let me just step back. The first thing to note about the early offer proposal is, in your incentive terms, the most powerful thing I think it does is create an incentive for the defendant to put money on the table because the current system, to take your point, Mr. Hoke, creates incentives for defendants to do exactly the opposite in a contingency-fee case. The contingency-fee lawyer is paid exactly the same fee whether he works 1 or 100 hours, and the way you squeeze down the plaintiff's lawyer is to exploit that conflict of interest between the plaintiff's lawyer and the plaintiff. This is not about fee overreach on the part of plaintiff lawyers. It's also defendants taking these intransigent settlement positions. And so the incentives are perverse. They reward the defendants who keep cases going and add to the cost and the delay of cases. So that's the first thing here, is that the proposal creates a defendant incentive to do the right thing rather than the current defendant incentives essentially in contingency-fee cases to do the wrong thing.

Now as to Mr. Weiner's concern, I've tried to address before, and I'll just say it again. There will be some loss to the attorney who comes in because of his reputation and gets a much higher settlement. No question—

Mr. HOKE. Much higher fast settlement.

Mr. HOROWITZ. Fast settlement.

Mr. HOKE. First offer settlement.

Mr. HOROWITZ. That's precisely right, by reason of reputation. But my point, Mr. Hoke, is that that is inherent in any system today. Mr. Weiner is retained by a client. He expects to have many hours to spend on that case. The other side comes in, sees, goodness gracious, Weiner's on the other side of the case; I'd better settle it quickly. And instead of Weiner being able to bill a thousand hours, he winds up billing 100 hours because of his reputation. That's one of the reasons why Weiner charges a much higher hourly fee than other lawyers can charge, because in the end he's still cheaper for his clients. He charges a higher hourly rate; the clients do better because of his skills and his reputation. So that will be—

Mr. WEINER. Can we make sure all that's in the record?

[Laughter.]

Mr. WEINER. I really would appreciate it. So would my office.

Mr. HOROWITZ. But I say again, you can differentiate here by charging, if you're a plaintiff's lawyer with a good reputation, you'll say to your client, "I will charge against an early offer, which will be high because of my reputation, \$500 an hour. And if you don't like it, go down the street to somebody who will only charge you \$100 an hour, but when they see his name on the demand letter, they're only going to offer half of what they're going to offer if my name is on the demand letter."

So it doesn't work out entirely; the good lawyer with the good reputation will get more cases, can by charging hourly rates get a higher fee, but there's no question about the fact that if all you've done is put your name to the letter, I don't care about the reputation; there is a fiduciary obligation here. You're not, simply because your name is better and you can get a higher early offer without any effort on your part, entitled to 40 percent of the entire sum. That's outrageous.

Mr. HOKE. Thank you, Mr. Chairman.

Mr. MOORHEAD. Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Weiner, you've pointed out some problems with loser-pays, and I think, from all that I've heard here and last week when we talked about it, and in the context of trying to promote settlement, which is the purpose of loser-pays, as well as this provision we're talking about today, two main problems: one is the one you exactly described. Who is the loser? I mean, I have personal experience with cases where dollars have been left on the table; you go to trial; you get a judgment; you've won the case; the jury awarded you a judgment. It's less than what you left on the table. I think you lost that case. I don't think you won it. And that is a problem. The other problem is the other that you noted, screening out middle income and lower income people who do not want to take the risk and get into court.

I think that there are ways to address both of those problems. In fact, I described one of those ways last week or I guess at the beginning of this week, when we had another panel. The trial lawyer who was here that day and the insurance representative both

thought it was a good idea, and that is, building on rule 68, offers in judgment, but actually leaving that alone and taking, whether you want to just take diversity cases or do you want to expand it larger than that, either way, have a system whereby a defendant can make an offer in settlement, not just an offer to take judgment; they may not want a judgment, but an offer to settle. The plaintiff does not accept the settlement, and they go on to trial. The cost of the trial itself, if the plaintiff loses—and by losing, I mean gets an award lower than the amount offered by the defendant. The plaintiff loses under those circumstances, pays those additional costs.

By the same token, the defendant can make an offer—oh, I'm sorry, the plaintiff can make an offer, and if the defendant refuses to take it, and it goes to court and doesn't reduce—get a judgment lower than that, they pay the plaintiff's cost of the trial, not all the costs. I mean, including attorneys' fees for the trial, but not the whole process.

Now the problem I have with Mr. Horowitz' plan—and I'll come to him in a minute—and the problem I have with rule 68 is, what about the defendant who says, "I'm not liable. I don't want to make an offer. I don't want an incentive to make a smaller offer. I want to go on to court"? Now in those circumstances, it seems to me that that is one of the biggest complaints we get from defendants in cases that are dragged into the case, joined in, or for whatever reason, and they say, "We're not liable at all. We don't want to settle cheaply. We want to make our point we're not liable and maybe make the precedent that the next time you sue us, you're going to go all the way through this process as well. So don't sue us if you don't have a good case." For them, I would say you can make an offer to dismiss with no attorneys' fees or court costs, and if you as a plaintiff don't accept that and insist on going on to trial, you then pay those attorneys' fees if you lose, if you don't get any verdict.

Now the advantage of that is that it gives the plaintiff the opportunity to get into the case, to find out, you know, what defenses there are, is there a good case there, and determine whether or not there is merit before they have to make that decision to either dismiss the case or go on with the case, if they think it's a good case, and take that risk, and they're not bearing the whole risk of the whole proceeding. They're only bearing the risk of the late portion of the proceeding, that cost. We would limit that so it wouldn't exceed the defendant's attorneys' fees as well.

What do you think about that?

Mr. WEINER. I think it has some nice ring to it. I hadn't heard all that before. I think the key part is it doesn't keep people from filing their lawsuits as in loser-pay, as H.R. 10 does. I think rule 68 can be effective. The reason rule 68 hasn't been effective in the past is because it's only one way and because it doesn't apply to attorneys' fees. It only applies to the cost, and the attorneys' fees is a much larger component of the expense for the litigants than the court costs are.

Mr. GOODLATTE. Well, I'm talking about attorneys' fees for the trial.

Mr. WEINER. Yes, I understand that.

Mr. GOODLATTE. We're not just talking about court costs.

Mr. WEINER. Yes.

Mr. GOODLATTE. The law right now usually will award court costs which are a pittance.

Mr. WEINER. Right. Exactly. That's what I said: it only applied to the court costs, and that's why it was—hasn't been a very effective tool in terms of settling cases.

I will say you've got some problems you have to look at very carefully in terms of whether you have parties who are economically disparate, and if you try to stick the party that has a lower financial backing with the party that has the more substantial financial backing's fees, you've got to worry about that.

Mr. GOODLATTE. The loser-pays provision that we have now says that you cannot pay your opponent's attorneys more than you're paying your own attorneys.

Mr. WEINER. Yes, but—

Mr. GOODLATTE. And that needs some fine-tuning, especially in contingent-fee cases.

Mr. WEINER. Exactly.

Mr. GOODLATTE. But there is a definition in there that handles that as well.

Mr. WEINER. But I think that—I think that has a lot—if you're—and I guess the key, again, is I'm always looking, you know, in your defendant situation, the one that wants to try it for principle's sake, that they didn't do anything wrong, so they can keep other people from suing them, or for whatever reason—the key to me is to find ways to get those cases resolved as quickly as possible.

Mr. GOODLATTE. I would think in most cases you're going to have both sides coming together, making offers, and they may not settle. They may not agree. The defendant may offer \$40,000; the plaintiff may want \$60,000, and they can't close that gap. They go to trial. It's between 40 and 60; nobody pays each other's attorney fees. Below 40, the plaintiff pays the defendant. If it's above 60, the defendant pays the plaintiff.

You have staked out a position that encourages, I think, a lot more settlement and also gives that defendant who says, "I'm not liable," something to put on and make it, put a transaction cost on a contingent-fee case for a plaintiff who, or a plaintiff's attorney, who may feel, hey, I'll just throw that case into court and we'll see what we get, because the cost of going forward is so great that the defendant will come in and pay me something.

Mr. HOKE. Would you yield for a quick question?

Mr. GOODLATTE. Sure.

Mr. HOKE. It seems to me that where you're—that it doesn't really change the system at all with respect to the loser-pays in the contingent-fee arrangement, to the extent that the indigent or middle income people that Mr. Weiner was talking about are not going to pay, and that unless—and I haven't heard anybody suggest this until—

Mr. GOODLATTE. Well, the middle income folks are certainly going to pay.

Mr. HOKE [continuing]. Until you just mentioned it, the idea, if you're going to make attorneys responsible for the other attorneys' fees, I think that starts to put some real teeth into this, but I

haven't heard anybody suggest that until you just—you mentioned it in passing.

Mr. GOODLATTE. Well, I'm not suggesting that. I'm suggesting that the cases are, in part, driven by the attorney, but they're also the plaintiff's case, and they have to make that decision in the end. You know, we certainly consider making the attorney, in part, liable here. What do you think about that, Mr. Weiner, as an attorney?

[Laughter.]

Mr. WEINER. It turns the justice system on its head. These are cases brought on behalf of individuals by attorneys. I don't think, Congressman Hoke, in all deference, you really want the attorneys to be more at stake in these things. I mean you want—

Mr. HOKE. I'm not advocating that.

Mr. WEINER. Oh, good.

Mr. HOKE. What I'm saying is that—what I'm saying is that I don't think—I think loser-pays is only for losers that have money. I mean, I think loser-pays is effective only when a loser has money, and it's really no different than the situation now, at least in 40 or 50 percent of the cases, where either somebody is lower income or indigent bringing it to—

Mr. GOODLATTE. Oh, I think that's exactly wrong. The percentage of cases brought in tort cases in this country mirrors the population of this country. You have wealthy people. You have middle income people, and you have poor people. And certainly those people who are so poor they have nothing, that is exactly true. That would happen in about 20 percent of the cases, but in 80 percent of the cases they would have something at stake in proceeding to trial in a case if they're worried about whether their case has merit.

Mr. HOKE. Well, we can differ about the percentages.

Mr. GOODLATTE. Mr. Fry, would you like to hop in here? You're on the outside looking in at all these attorneys.

Mr. FRY. Yes. I wasn't as shocked as my panelist at the concept that a lawyer might have to pay a penalty. You already have that rule under rule 11. It's possible for a lawyer to be penalized under rule 11, and, presumably, if that rule worked properly—

Mr. GOODLATTE. That's a good point.

Mr. FRY [continuing]. It would clean out the frivolous cases, but nobody blanches at that rule, which was in a sense a lawyer-judge-created rule in its origin.

Mr. GOODLATTE. And all judges are former lawyers, and there is a great deal of reluctance, in my experience, to apply rule 11. And there are too many loopholes in rule 11 to find reasons not to apply it. This would be a situation in which it would be applied in all circumstances. It would be a matter of right that the plaintiff or defendant would have to proceed to request those attorneys' fees, and there would be a way of defining what the attorneys' fees were. I think that that gives you some certainty, but it also makes it—imposes a cost for somebody who goes into court and otherwise with a contingency case has no risk whatsoever, and gives the defendant the opportunity who says, "I'm not liable at all," to say, hey, there is a risk for you; it isn't just a free ride here; you will pay my attorneys' fees if you go all the way to court without dismissing this

case, and that's the intent there. It answers both of the objections you raised, and others have raised, to the loser-pays, I think.

Mr. FRY. May I make one more point? I think there are situations where it is not true that the parties, particularly plaintiffs, are making the decisions in the case. I think very often these cases that strategies are decided by the lawyer who tells the clients this is just; this is right; this will win. And what does the client know? The client really has no power to make these judgments.

So if you're going to penalize a losing plaintiff who hasn't the training, background, knowledge, or education to make decisions, and let the lawyer who advises this course of conduct go scot-free, it strikes me as a little unfair.

Mr. GOODLATTE. Well, I think you're going to find that the relationship will change considerably when the word gets out that the plaintiff's lawyer may be presenting him with the defendant's bill, if that plaintiff's lawyer doesn't do his job properly and advise him properly.

Mr. Horowitz, getting back to yours, you know my No. 1 objection to your plan is price controls.

Mr. HOROWITZ. Right.

Mr. GOODLATTE. And I resist that. I resisted it last year in terms of price controls on doctors. There is always an unintended consequence of government stepping in and saying you can't do it.

Mr. HOROWITZ. There are lots of ways to skin that cat. I'd like, if I can, to respond at some point to the questions you—

Mr. GOODLATTE. I will. Let me raise—

Mr. HOROWITZ. But I will say—I'm sorry.

Mr. GOODLATTE. Let me raise the other two concerns I have about you—because I, let me say, I think that you have a very well-thought-out proposal which will certainly accomplish some of the goals that you intended to accomplish, but here are the other concerns I have:

Your procedure which says you get 10 percent, a maximum of 10 percent, based on an hourly rate. If the plaintiff decides not to accept that offer, then the plaintiff can go on to court and the plaintiff's attorney's only entitled to the additional amount that is added to that offer, your concept of adding value. However, that only takes into account one-half of the equation in a civil trial. Damages certainly is an important part, and a lawyer certainly can add value in that respect, but he also has to, whether he's getting a contingent fee based on half of the amount or the full amount, he is always having to prove all of the liability in the case before he can recover. And for that reason, to limit his contingent fee to the second—to only what is above what the defendant offers is, in my opinion, to very severely marginalize the value of what I think is the primary work that goes into these cases, and that is proving the liability.

The third point is this: in your case the pressure by having a cap, a very, very low cap on attorneys' fees in this first, I guess, 60-day offer period has the effect of putting extreme pressure on the defendant in the case to settle the case, whether or not they think the case has merit. And we talked about this before as well.

In the case of a doctor, for example, where the money may not be as important to him as the liability, he's now going to be faced

with a situation of wanting to take that case through and prove that he did not do anything wrong and should not be held liable, and he's going to have an insurance company all over his back telling him to settle that case because they can get out of it a lot more cheaply by doing that.

Those are the three points that I'd ask you to respond to.

Mr. HOROWITZ. OK, quickly. To the extent of concern about any Federal legislation that caps fees in any kind of way, the first response is to say then take a harder look at Moore-Gephardt which doesn't do it at all and which, in my judgment, is an even more profound reform. Why the Republican majority does not pick up on this extraordinary device that the once majority, now minority leader, introduced, and use it both in political and policy terms, mystifies me. It comes a little late in the game. It was hard to get the ball rolling, but the ball is now rolling and Moore-Gephardt takes care of your problem. And my judgment is that, through the exercise of leadership, some Moore-Gephardt variant can solve that problem.

But in regard to your question I would also say that price-fixing always goes on when fiduciaries are involved. We are now capped as lawyers in the fees we can charge. The courts have indicated that, of all fees, the contingency fee is the one which has the greatest prospect for overreach. ATLA's own resolution on the subject says explicitly that the contingency-fee percentage should vary with the degree of risk and effort that the case calls for. All we're asking to do is put teeth in ATLA's own recommendation. It states the principle; it recommends it, and then it walks away from it. That's part of the problem that exists with the bar, but there are also lots of other ways to skin that cat.

You can take that fee and say, rather than Congress fixing it, you can peg it to the maximum fee permitted under State ethics laws and cut that figure by some significant percentage for the early-offer settlement. There are ways in which, rather than picking the 5-percent and 10-percent figures, you can anchor it to existing State law, which moderates your concern in some respect. So I think that's yet another approach.

But there's no question but that, as long as you've got a body of ethics law and a rule which says a lawyer has a fiduciary obligation, especially in settings with a high potential for overreach, where a monopoly of information is largely vested in the lawyer, you've got to have some kind of regulation and capping of fees. That's traditional particularly in the area of contingency fees.

On the liability question, you say that we've understated the—we've cut down the fee too much in terms of the so-called value-added because—

Mr. GOODLATTE. When I file a suit, I never know whether I'm going to settle it in—

Mr. HOROWITZ. I precisely—

Mr. GOODLATTE [continuing]. Or whether it will go all the way through to the court of appeals.

Mr. HOROWITZ. No question about it, but, no, here we get very close to the point you were making about your proposal requiring an assumption of the risk of turning down an offer. What's going on here is the context of getting that difference between an offer,

and what you ultimately achieve in a litigation is the defendant said, for all purposes, I'm liable; here's the pot of cash. And so the only setting in which that arises is a setting in which the attorney—and Bill Fry's right in this case—it's the attorney who controls whether to go to trial because it's the lawyer's time that's involved. So the lawyer turns down the cash. He's assuming the risk that he may have to prove liability, and he may not do it. That's—I mean, that's the very premise on which you operate.

I want to get to the third point you make because in some ways that's the most intriguing.

Mr. Chairman, I see the red light's on. If it's OK for me to respond—

Mr. MOORHEAD. It's OK, of course.

Mr. HOROWITZ. I'm sorry.

What you're really saying here is we would make it so attractive financially for defendants to put real settlements on the table, by cutting the cost of a settled case, knocking out his defense lawyer's fee, knocking the plaintiff's lawyer's fee, we cut settlement cost by about 40 percent here if the defendant earns it by putting real money on the table you're worried that some dumb defendants are going to lay down and make offers in cases where they would not make offers now.

Well, let me just say if you don't think that—

Mr. GOODLATTE. You don't think the defendants buy their way out of cases now, especially insurance companies?

Mr. HOROWITZ. I want to tell you, Mr. Goodlatte, there will be some dumb defendants who do that, and the word will get out real fast that these are guys who are ready to settle cases easily, even when there's no substantial—even when there's a modest claim against them, these guys—

Mr. GOODLATTE. Mr. Horowitz, the word is already out. You talk to any lawyer in the country who handles plaintiff cases; they'll tell you which insurance companies are easier to settle with than others.

Mr. HOROWITZ. Precisely, Mr. Goodlatte, precisely. And what I'm saying is the insurance companies for whom the word is out that they will settle easily are the companies that get lots of lawsuits. The people keep bringing suits against them. They wind up paying. There is no question but that there will be a point of equilibrium that will be reached that probably will generate a few more settlements at the margin than we now have, which is probably pretty good.

Mr. Goodlatte, any defendant who uses an early-offer mechanism to settle a substantially higher proportion of cases than he now settles is a fool because the word will be out; the number of suits brought against him will multiply. He will pay through the nose. All you're saying is the—

Mr. GOODLATTE. But that's the intent. You just testified that was the intent—

Mr. HOROWITZ. No, it is not the—

Mr. GOODLATTE. Oh, yes, you testified that the intention of this was to get more settlement offers from defendants than you're getting now.

Mr. HOROWITZ. No, no.

Mr. GOODLATTE. The defendant doesn't even know in the first 30 or 60 days of the case whether he's got a good defense to the case or not. There is a tremendous incentive, unrelated to the merits of the case, to settle the case early. And that, to me, in the case of somebody whose professional liability, professional reputation is at stake, a doctor, an engineer, anybody who wants to stand on principle is now being given a monetary incentive not to do so. That's exactly the inverse of the problem you're trying to solve.

Mr. HOROWITZ. Well, we—pardon my raised—the raised temperature here. I will simply say that—

Mr. GOODLATTE. I used to do it for a living. So I don't take any offense.

Mr. HOROWITZ. Well, me, too. Me, too.

I did not say that the proposal will generate many more settlements, and if I did, what I clearly—the thrust of everything we've written is to say it will generate many more early settlements that avoid the high cost of litigation. We are not creating a more powerful incentive on the part of defendants, particularly this early in the case, to lay down—we're not saving 90 cents on the dollar; we're saving them 40 cents on the dollar. That's a lot of savings, but you've still got to—

Mr. GOODLATTE. It depends on the size of the case, though, doesn't it?

Mr. HOROWITZ. Well, it may, but—

Mr. GOODLATTE. If it's a small case, it might very well be 90 cents on the dollar.

Mr. HOROWITZ. Mr. Goodlatte, if any set of defendants offers, makes offers, because the high cost of the case is greater than the amount they'd have to pay, those defendants wind up paying through the nose, and the insurance companies that do well, the defendants that over the long haul do well are the ones who do not submit to the blackmail that is caused by, essentially, the high cost of litigation. Dumb defendants cave in these cases.

Mr. GOODLATTE. You've got the same pressures between a plaintiff and a plaintiff's attorney that exist between a defendant and a defendant's insurance company.

Mr. HOROWITZ. Correct.

Mr. GOODLATTE. And you have got to address the fact that you're creating one incentive for one that may be very different than the incentive for the other.

Mr. HOROWITZ. Mr. Goodlatte, if you want to—if you're worried that reducing the cost of settling a case will cause lots of people to settle cases that they shouldn't, you're being a kind of nanny worrying about defendants here who may or may not operate in their interest. If at the margins they settle cases more often—

Mr. GOODLATTE. I think when government steps in with price controls, they're being a nanny, too.

Mr. HOROWITZ. Well, then go to Moore-Gephardt, it's not price controls. Price controls have to do with the relationship between attorneys and their clients under the fiduciary standard. If you want to knock out a fiduciary relationship, that's a really radical step for you to take because price controls are inherent in such a relationship. As Mr. Weiner has said, as we've all said, there is a reasonable fee obligation that's part of the code, the model code, and if

you want to repeal it, you'll get lots of—I won't be on your side and I don't think many people will be on your side.

Mr. HOKE. If you would yield for one moment—I think the price control argument is truly a bogey. I mean, the fact is that we've already controlled prices in this area in many ways on the Federal bench. If you don't believe that that's true, why not go to—allow a 90-percent contingency fee?

Mr. GOODLATTE. Because the market—

Mr. HOKE. Nobody can get a 90-percent contingency fee because nobody is going to hire an attorney, but attorneys have a monopoly call on the bar.

Mr. GOODLATTE. Wait a minute. There are plenty of attorneys out there who compete for cases. If you don't—just look in your yellow pages or in the—

Mr. HOKE. Well, maybe I could ask Mr. Horowitz for one example where we had competition.

Mr. GOODLATTE. Sure.

Mr. HOKE. What happened in the airline industry?

Mr. HOROWITZ. What we did—well, you know the situation. I would also say that the Federal statutes are filled with fee caps at 25 percent, the Federal Tort Claims Act, the False Claims Act, the Veterans' Benefits Act, the Social Security Act. Every time when the Federal Government is sued, there is the kind of cap that I find, frankly, anticonsumer appalling because it's an across-the-board cap.

Mr. GOODLATTE. Sure. In cases of veterans, you can get what, \$10 or something?

Mr. HOROWITZ. Yes. Well, we changed that.

Mr. GOODLATTE. They don't want attorneys representing veterans. I think that's wrong, frankly.

Mr. HOROWITZ. I agree, and the Supreme Court has changed it, but I do want to say on the price fixing—

Mr. GOODLATTE. You can't get an attorney to represent a veteran because of price controls.

Mr. HOROWITZ. That's—and the Supreme Court so stated, Mr. Goodlatte, but I would—the thing about the regulation of fees here in this proposal is, what's striking about it is, it narrows the scope of regulation from what now exists. What you see by way of so-called reforms is what's in all these Federal statutes. They cap the totality of the fee, say, at 25 percent. The plaintiffs' lawyers beef about that, and I think they've got a good claim, because of what happens in that setting—you and I agree in this regard. What happens—but that's the direction of reform, and it's inherent in the notion of a fiduciary relationship where lawyers have that obligation vis-a-vis their own client.

What happens with an across-the-board cap, is you reduce the windfall in windfall cases to 25 percent, but also lower the marginal rate of return and so encourage defendants to play games with plaintiffs in the tough cases, that real claimants with tough cases can't get lawyers. So I'm against the capping of fees when a lawyer is assuming risks. What I'm not for is for the lawyer to get the standard—and you say it's 33 percent; it's edging up to 40 percent in parts of the country—where the lawyer is not assuming any kind of risk. Where's the quid pro quo here?

Mr. GOODLATTE. Well, the risk is that he's still got to prove liability and there's not necessarily—

Mr. HOROWITZ. Only if he turns down the offer, Mr. Goodlatte, and in that case, he ought to be exposed to risk.

Mr. GOODLATTE. Of course. Of course, but if he turns down the offer because there isn't enough money involved in the settlement, he has got to do both the work to prove that it's worth more and the work to prove liability, and in a small case the cost of proving liability can be just as great as in a large case.

Mr. HOROWITZ. Mr. Goodlatte, all I can say is the defendant who doesn't make the offer sweet enough to save himself from the price of counsel that he will have to pay, from the long exposure of the lawsuit, the defendant who leaves enough money on the table to allow the plaintiff's lawyer to earn a living off the case by getting lots more than was put on the table will pay a heavy price. What this does is create a kind of mechanism that, as I said to Mr. Hoke, reverses the incentives of the system, so that defendants, instead of playing games and litigating endlessly and stretching things out, is going to have one early window to put enough money on the table.

Mr. GOODLATTE. We're, I think, overabusing the chairman's time. Let me just say this: that I admire much of what you do here, and some of the effects that you talk about certainly will happen, and I think you are definitely headed in the right direction in wanting to encourage settlement of cases. But I just think that there are some unintended consequences of imposing controls that I would be very careful about, and I think that my mechanism that I've talked about here addresses those concerns and leaves it more to the individual decision of both the plaintiff and the defendant and their attorneys, who, hopefully, will give them wise counsel.

Mr. HOROWITZ. Mr. Chairman, may I just say one thing to Mr. Goodlatte on this thing? On your proposal, let's say I find lots in it that's good but I would add the following to your—on your proposal:

One, I think stiffening up rule 11 will do an awful lot of what you want, and we ought to be tightening up rule 11.

Mr. GOODLATTE. Can I ask a question about it? Rule 11 is—I mean, in most jurisdictions it's simply not followed.

Mr. HOROWITZ. I agree.

Mr. GOODLATTE. And the reason is there are so many ways out of it.

Mr. HOROWITZ. Well, you can—but, then, get creative in those cases where the case that was brought was a real strike-suit kind of case with no substantial merit.

Mr. GOODLATTE. We've got to give a very definite, clear line—

Mr. HOROWITZ. Fine, but—

Mr. GOODLATTE [continuing]. Where the sanctions have to occur.

Mr. HOROWITZ. I don't doubt it, but I say toughening it up, it's fine.

The second thing I would urge upon you, as one who has seen tort reform go no place in this country because the forces of reform always can be caricatured as favoring the deep pocket, is to restrict your loser-pays notion to intracorporate lawsuits where both sides

have got a lot of bucks. That's a way to start on that. And if you did it that way, I think we'd have a good experiment.

Your notion that the middle class person would have to pay only the cost of the defense attorney's court costs, that's a heck of a big "only," and middle class people will not be able to do it and you will force middle class people to cave and you will be properly caricatured as a guy on the side of the deep pocket. If you're talking about middle class, noncorporate plaintiffs that can't afford those risks, then they'll have to take what's on the table rather than to bear them.

So I think you run into the typical Republican conservative—and I'm one—problem. Every time we go to reform, we're on the side of the deep pocket. Get out of that box. That's what's held us back for those years. As a strategic matter in tort reform, don't get in that bind.

And the final thing I'd say is I think the impact on settlements—I have my doubts about impact on settlements of your proposal, but you want to do it make the big boys play that game. Do it—for substantial intracorporate lawsuits. See how it works, but that hammer over the head of a middle class individual with a tort claim having to pay, if he's wrong on turning down the settlement offer, the defendant's court costs—I can see the negotiation. The defense attorney's going to say, "Listen, you know, I go for \$300 an hour and this is going to be a long trial going for 6 weeks, and, you know, my friend, you're going to have to pay that. You're not poor. You're middle class." I know if I had a claim, I'd have to cave and take whatever peanuts got thrown on the table. That's the problem with loser-pays.

Mr. GOODLATTE. Well, but, remember, you're limiting that to what your own attorney is spending.

Mr. HOROWITZ. Even so—

Mr. GOODLATTE. Let me ask you one final point here. Loser-pays is in this legislation. Do you like this better than loser-pays?

Mr. WEINER. Like your proposal better than contract loser-pays?

Mr. GOODLATTE. Yes. Mr. Horowitz.

Mr. HOROWITZ. I like neither. I think conservatives and Republicans—

Mr. GOODLATTE. But if you have to choose—

Mr. HOROWITZ. I don't—I vote—if you're asking me, I vote no on both. I will never be in favor of a proposal that exposes a middle class person to paying substantial legal fees. That risk, that loser-pays provision, is the poison pill that can do in tort reform, when we've got 70 percent of the American people desperate for reform, thinking the system is rotten.

Mr. GOODLATTE. That happens every day in America when middle class people are sued as defendants in cases and have to pay their own attorneys' fees even when there's no merit. Now here we are creating a system that creates parity in that regard, and I think that it's a darned sight better than the current system we're living with or with the loser-pays provision that's in this bill.

Thank you, Mr. Chairman.

Mr. MOORHEAD. I want to thank you all for coming today. You've spent the day with us. We appreciate your testimony. We'll keep our record open for a couple of days. If you've got any additional

information or suggestions on ways any of our bills could be changed, we would appreciate your calling us.

I want to particularly thank Mr. Hoke and Mr. Goodlatte for being here. I think this is a great discussion that you have carried on with our panel the last 45 minutes. I think it really adds to the debate and to the record.

Thank you all. The subcommittee is adjourned.

[Whereupon, at 2:47 p.m., the subcommittee adjourned.]



APPENDIXES

APPENDIX 1.—LETTER DATED FEBRUARY 9, 1995, TO CHAIRMAN MOORHEAD, FROM L. RALPH MECHAM, DIRECTOR, ADMINISTRATIVE OFFICE OF THE U.S. COURTS

L. RALPH MECHAM
DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

WASHINGTON, D.C. 20544

February 9, 1995

Honorable Carlos J. Moorhead
Chairman, Subcommittee on Courts and
Intellectual Property
Committee on the Judiciary
United States House of Representatives
111 Cannon House Office Building
Washington, D.C. 20515

Dear Mr. Chairman Moorhead:

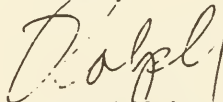
As part of the proposed "Contract with America," the House Judiciary Committee is considering H.R. 10, the "Common Sense Legal Reforms Act of 1995." The Executive Committee of the Judicial Conference of the United States, acting on the Conference's behalf, has reviewed certain sections of the bill that have the potential to impact the federal judiciary.

Section 101 of H.R. 10 is entitled "Award of Attorney's Fee to Prevailing Party in Federal Civil Diversity Litigation" and would, within a limited scope, award a reasonable attorney's fee to a prevailing party in a diversity case. The Judicial Conference takes no position on this proposal, considering fee shifting to be a matter of policy that is properly left to Congress. However, recognizing that such a statute could increase both the volume of litigation and the court-related burden of resolving fee determinations, the Executive Committee expressed the hope that Congress would consider the judiciary's need for additional resources should it enact fee shifting legislation.

Section 105 of H.R. 10 is entitled "Notice Required Before Commencement of Civil Action," and would, with certain exceptions, make prior notification a prerequisite to bringing suit in federal district courts. The Executive Committee, on behalf of the Judicial Conference, believes that more empirical data is needed to accurately assess the effectiveness of the requirement as well as its impact on the courts. For the same reason, the Executive Committee opposes the pre-filing notification section contained in the current proposed legislation.

Noting that the Judiciary Committee has scheduled a hearing on the "Common Sense Legal Reforms Act of 1995" for February 10, 1995, I ask that the views of the Judicial Conference be included in the official record of that hearing.

Sincerely,



L. Ralph Mecham
Director

APPENDIX 2.—LETTER DATED FEBRUARY 15, 1995, TO CHAIRMAN MOORHEAD, FROM ROBERT D. EVANS, DIRECTOR, AMERICAN BAR ASSOCIATION GOVERNMENTAL AFFAIRS OFFICE



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The Honorable Carlos J. Moorhead
Chairman
Subcommittee on Courts and Intellectual Property
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

I am writing to you in reference to the February 6 and 10 hearings before your Subcommittee on Sections 101, 102, 104, and 105 of H.R. 10, the "Common Sense Legal Reforms Act."

Yesterday, the House of Delegates of the American Bar Association adopted two resolutions relevant to the issues you addressed in the hearings. The first resolution supports the availability of access to the federal courts under the grant of diversity jurisdiction without regard to financial wherewithal and opposes "loser pay" legislation that would apply to all cases brought in the federal courts pursuant to the grant of diversity jurisdiction. The second resolution reaffirms the ABA's support for the Congressionally enacted judicial rulemaking process set forth in the Rules Enabling Act and opposes those portions of H.R. 10 that would circumvent that process.

I am enclosing copies of the resolutions, along with the background reports considered by our House of Delegates when it adopted these resolutions. I ask that both the resolutions and reports be made part of the hearing record. The resolutions constitute the official ABA policy. The report is for background only.

Thank you for giving the ABA this opportunity to advise you of the views of the Association on these important matters.

Sincerely,

Robert D. Evans

Robert D. Evans

Resolution adopted by the

House of Delegates

of the

AMERICAN BAR ASSOCIATION

February 1995

RECOMMENDATION

RESOLVED, That the American Bar Association reaffirms its support for 1
the Congressionally-enacted, judicial rulemaking process set forth in the Rules 2
Enabling Act and opposing those portions of the Common Sense Legal Reform 3
Act or other legislation that would circumvent that process. 4

REPORT

Background

In 28 U.S.C. §§ 2072-74, Congress has prescribed the appropriate procedure for the formulation and adoption of rules of evidence, practice and procedure for the federal courts. This well-settled, Congressionally-specified procedure contemplates that evidentiary and procedural rules will in the first instance be considered and drafted by committees of the United States Judicial Conference, will thereafter be subject to thorough public comment and reconsideration, will then be submitted to the United States Supreme Court for consideration and promulgation, and will finally be transmitted to Congress, which retains the ultimate power to veto any rule before it takes effect.

This time-proven process proceeds from separation-of-powers concerns and is driven by the practical recognition that, among other things:

- * Rules of evidence and procedure are inherently a matter of intimate concern to the judiciary, which must apply them on a daily basis;
- * Each rule forms just one part of a complicated, interlocking whole, rendering due deliberation and public comment essential; else the impact of any rule may be quite different in quality or force than that which was intended; and
- * The Judicial Conference is in a unique position to draft rules with care in a setting isolated from pressures that may interfere with painstaking consideration and due deliberation.

The American Bar Association has consistently supported federal rulemaking through the Judicial Conference. *See, e.g.*, the January 1982 Resolution adopted by the House of Delegates specifically urging Congress to adopt legislation that ultimately took form as 28 U.S.C. § 2073 in 1988 (expressly delegating rulemaking authority to the Judicial Conference). The rule changes proposed in the Common Sense Legal Reform Act (the "CSLRA") (excerpts attached) demonstrate the perils of political interference in the rulemaking process and the inaptness of the result that political rulemaking can produce.

CSLRA Proposals

"Honesty in Evidence." Section 102 of H.R. 10 would add a new subdivision (b) to Rule 702 of the Federal Rules of Evidence with the avowed intention of codifying the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 125 L.Ed. 2d 469 (1993). In reality, however, this Rule 702(b) neither codifies *Daubert* accurately nor confines itself to codification.

First, Proposed R. 702(b) distinguishes between the "validity" and the "reliability" of scientific evidence -- a distinction expressly disavowed in *Daubert*, 125 L.Ed. 2d at 481 n. 9 -- and fails to define either term.

Second, the proposal reverses the Rule 403 balance, which *Daubert* expressly applies to Rule 702 testimony. 125 L.Ed. 2d at 484. (Rule 403 permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" (emphasis added). Proposed Rule 702(b), in contrast, requires that the proffered opinion be "sufficiently reliable so that the probative value of such evidence outweighs the dangers specified in Rule 403" (emphasis added)).

Third, Proposed Rule 702(b) is expressly limited in scope to scientific evidence, while existing Rule 702 also applies to "technical, or other specialized knowledge." This scope limitation has two important implications: (a) by operation of traditional rules of statutory interpretation, it reflects a conscious decision to bar extension of *Daubert* to other types of expert opinion testimony -- something *Daubert* expressly does not do (125 L.Ed. 2d at 481 n. 8) -- and (b) the result is that the reverse Rule 403 balancing test applies only to scientific opinion and not to other expert opinion testimony (which remains subject to the existing Rule 403 test). Among the problems this generates: opinion testimony is often not easily cabined as purely "scientific" (as opposed to being at least partially "technical" or "other" in character). Nor is there any apparent reason to apply different Rule 403 balancing tests to different types of opinions.

If Congress believes that codification of *Daubert* warrants further study and analysis, it should expressly commend the issue to the Judicial Conference for prompt attention -- as, for example, it did last autumn in § 40153 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322.

Section 102 of the CSLRA would also add a new Evidence Rule 702(c) barring testimony from expert witnesses entitled to receive any compensation contingent on the outcome of any claim with respect to which their testimony is offered. Contingent fee expert testimony is, however, already barred by DR 7-109(c) of the ABA Model Code of Professional Responsibility and, in most jurisdictions (where the practice is prohibited by law), by Rule 3.4(b) of the ABA Model Rule of Professional Conduct. In those few courts in which this practice is permitted, it can be -- and doubtless is -- the subject of cross-examination. (*United States v. Abel*, 469 U.S. 45 (1984) (bias impeachment permitted under Federal Rules of Evidence).) There is no warrant for Congressional usurpation of the judicial rulemaking prerogative, particularly in the absence of any urgent need or pressing problem in this area. Moreover, purely as a drafting matter, it is unclear how this proposed provision is to be reconciled -- particularly in *pro bono* cases -- with more than 2,000 existing fee-shifting statutes, many of which provide for expert witness fees. The Judicial Conference is, among other things, currently considering the entire issue of which ethical rules should govern in the federal district courts, a study that directly raises the contingent-

fee testimony issue. The Judicial Conference should consider the issue in the first instance, both as a matter of legal ethics and of evidence.

Rule 11. In 1983, Rule 11 was amended to require the imposition of sanctions for the filing of any litigation paper that was not well founded in fact or law. A principal reason that the experiment with mandatory-sanctions failed is that it profligately wasted scarce judicial resources. More than 7,000 sanctions decisions were reported under the 1983 version of Rule 11, and Federal Judicial Center ("FJC") empirical studies conclusively demonstrated that this represented just the tip of the iceberg.¹ In the words of Judge Sam Pointer, former Chair of the Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure:

"[T]he FJC studies amply support our [the Advisory Committee's] conclusion that there has been an excessive and unproductive amount of Rule 11 activity [under the 1983 version of the Rule]."

Statement of Sam C. Pointer, Jr., before the House Judiciary Subcommittee on Intellectual Property and Judicial Administration (June 16, 1993).

Judges applying the 1983 version of the Rule lacked discretion to decide, in marginal or trivial cases, that the time and attention necessary to determine whether sanctions should be awarded were not worth the effort. Consequently, judicial resources were pointlessly consumed when federal courts were repeatedly required to engage in extended analysis to decide inconsequential issues -- for example, whether it was sanctionable for a lawyer not to read the final word processing printout of a pleading which, due to a computer glitch, included extraneous matter;² whether punishment was required for an unintended misstatement in a pleading that was clearly corrected in appended exhibits;³ or whether a single losing argument, in a brief containing many solid arguments, had to be punished.⁴ All of this was a colossal waste of judicial time.

¹ See *FJC Directions* No. 2, at 7 (Nov. 1991): In five districts studied by the FJC, there were only 66 published Rule 11 decisions during the years 1983-89, but the FJC study found almost 1,000 unreported cases involving Rule 11 in the shorter period of 1987-90. (In contrast, there were fewer than two dozen reported decisions construing the predecessor Rule 11 in the 45 years from 1938 to 1983.)

² *Ault v. Hustler Magazine, Inc.*, 860 F.2d 877 (9th Cir. 1988), cert. denied, 489 U.S. 1080 (1989).

³ *Kusan, Inc. v. Alpha Dist., Inc.*, 693 F. Supp. 1372 (D. Conn. 1988).

⁴ *PaneWebber, Inc. v. Can Am Fin. Group, Ltd.*, 121 F.R.D. 324 (N.D. Ill. 1988), *aff'd mem.*, 885 F.2d 873 (7th Cir. 1989).

Mandatory sanctions clogged the courts in other ways as well. For example, they also interfered with settlement because parties could not even withdraw pending sanctions motions. Once a sanctions issue had been flagged, the judge was affirmatively required to impose a sanction if he or she detected a violation. Sometimes several years elapsed between the time a lawsuit was voluntarily dismissed and the time that the judge resolved a previously-filed sanctions motion.⁵

Perhaps the failure of mandatory sanctions was most poignantly illustrated in those cases in which the district court felt constrained to penalize lawyers for asserting purportedly frivolous positions -- only to have those positions vindicated on the merits on appeal.⁶ Things had obviously wandered far afield when there existed exposure to sanctions for asserting even meritorious positions in good faith.

Effective December 1, 1993, following years of study, deliberation and drafting by the Judicial Conference, Rule 11 was amended in several respects, perhaps most importantly conferring on judges the discretion whether or not to impose sanctions should a violation be found. Section 104(b) of the CSLRA would reverse this amendment, and it would stimulate even more activity than under the 1983 version of Rule 11 by adding fee shifting -- the compensation of injured parties -- as a new, stated purpose of the Rule. This restoration of the status quo ante would ignore all experience under the 1983 version of Rule 11, exacerbate its worst features, and resuscitate and accelerate the enormous amount of judicial time and attention devoted to nonsubstantive motion practice. It should not be enacted into law.

Securities Class Actions. Title II of the CSLRA is composed of a series of securities litigation reforms. Many of the Title II provisions would enact substantial changes in class action procedure in securities fraud cases:

- * Section 202(a) mandates a guardian *ad litem* or steering committee for every plaintiff class and specifies their qualifications and duties.
- * Section 202(b) requires certain communications between class counsel and the class concerning prospective settlement and attorneys' fees.
- * Section 203 prohibits any additional recovery for a named plaintiff; sets forth minimum financial interest and named plaintiff must have in the lawsuit; and calls for judicial scrutiny of any conflict of interest posed by class counsel's

⁵ See, e.g., *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) (4 years passed between plaintiff's voluntary dismissal of its complaint and district court's resolution of a sanctions motion filed prior to dismissal).

⁶ See, e.g., *Kucel v. Walter E. Heller & Co.*, 813 F.2d 67 (5th Cir. 1987); *Trident Center v. Connecticut Gen. Life Ins. Co.*, 847 F.2d 564 (9th Cir. 1988).

holding a financial interest in the outcome of the lawsuit as a member of the class, *inter alia*.

- * Section 204 sets forth requirements for pleading scienter in fraud cases.

The first three proposals revise practice under Rule 23 of the Federal Rules of Civil Procedure. The last revises practice under Rule 9(b). Some or all of these proposals may have merit. If so, there is no apparent reason to limit them to securities fraud cases. If not, there is no reason to impose them in securities cases. In all events, they merit serious study and should be committed to the Advisory Committee on the Federal Rules of Civil Procedure for review and consideration.

Conclusion

The Rules Enabling Act of 1934 (28 U.S.C. § 2072) and the attendant legislation enacted by Congress have, over many years of practice, demonstrated the wisdom of committing the rules of evidence and procedure to the rulemaking process. The flaws of the proposed rules contained in the CSLRA bear witness to the soundness of that process. The American Bar Association supports the Rules Enabling Act process and opposes those portions of the CSLRA and other legislation that would circumvent it.

Respectfully submitted,

David C. Weiner, Chair
Section of Litigation

February 1995

**Resolution adopted by the
House of Delegates
of the
AMERICAN BAR ASSOCIATION**

February 1995

RESOLVED that the American Bar Association reaffirms its support for access to 1
the American system of justice without regard to financial wherewithal, and it is further 2

RESOLVED that the American Bar Association supports the availability of access 3
to the federal courts under the grant of diversity jurisdiction without regard to financial 4
wherewithal, and it is further 5

RESOLVED that the American Bar Association opposes loser pays legislation that 6
would apply to all cases brought in the federal court pursuant to the grant of diversity 7
jurisdiction. 8

REPORT

A hallmark of the American Bar Association has been the goal of providing access to justice for all. In that regard, the ABA has been a leader in supporting a) legal services for the poor, b) the allocation of more resources to the court system, c) improvements in the efficiency of handling cases and d) expanding the use of alternative dispute resolution. The ABA has also led the way in preserving diversity jurisdiction in the Federal courts, a fundamental grant of jurisdiction whose importance continues undiminished.

Now the ABA is confronted with a proposal, part of the Contract with America, which would undo much of the good that has been accomplished on access to justice issues while undermining diversity jurisdiction in a fundamental way. For the first time this proposal would implement a loser pays requirement on all diversity cases filed in federal court, imposing this requirement without regard to the identity of the parties or the subject matter of the litigation.

The Bill provides that the District Court "shall award" to the party that "prevails" a reasonable attorney's fee that may not exceed the actual attorney's fees of the non-prevailing party or, if no such fee was incurred because the non-prevailing party had a contingency fee agreement, the reasonable fee that would have been incurred by that party if that party were represented by an attorney proceeding on a non-contingent basis. The only discretion given to the Court is to refuse or reduce an award if the Court finds "special circumstances" that would make an award "unjust," terms otherwise undefined. The problems with this loser pays provision are profound.

First, and most important, it undermines access to the federal courts by the middle class and the poor. All of the advantages provided by the time-honored availability of lawyers who will take matters on contingent fees are jettisoned by the fact that the client who hires a lawyer on a contingent fee basis, if she were to lose, would be responsible for the fees of the other side. Even for those who are able to proceed on a non-contingent fee basis, the fact that the individual or small company might be liable not just for their lawyer's fees but for double those fees means that the access to the courthouse will be reduced.

The proposal would also fall harshly upon those who bring litigation to vindicate public rights and establish important principles. Entities that bring such litigation have difficulty obtaining lawyers and finding the necessary funding for legal services now. If in pressing such litigation in the future they were forced to confront the penalty effected by this loser pays rule, much, if not all, of this important law-shaping litigation will not be brought in the federal courts.

The rule is in effect a regressive tax on the right to litigate. A fee shifting statute will not deter wealthy corporations and individuals from litigating their claims. The rule will bind more and more until it reaches the poorest of our citizens, who only can proceed

through counsel who undertakes the matter on a contingency fee or on a pro bono basis. But the benefits offered by those two alternatives would be totally eliminated by this legislation.

The proposal draws on the experience with fee shifting provisions that are employed in England and Wales. When supporters of this proposal look across the Atlantic for support, they fail to acknowledge that all litigants in England and Wales whose incomes are below \$45,000 a year receive complete free legal services and for them loser pays is no deterrent.

Its advocates suggest that one purpose of the rule is eradicating frivolous litigation. The problem is that the proposal makes no distinction between cases that are frivolous and those that are meritorious; all are subject to the same draconian provision. Thus, it will discourage the institution of any litigation unless the individual or small company is so convinced of the merits of its case that it is prepared to run the significant risk of the fine this legislation imposes. The ABA should never find itself in the position of suggesting that the courts are only open for disputes where the result is certain. It is just in those situations where either the facts and/or the law present close questions that the courts provide an extraordinary service to our citizens for resolving their disputes.

The courts today have ample authority to deal with the frivolous lawsuit and to charge attorneys fees against the loser in cases that cry out for such extraordinary relief. That court-imposed remedy is more than sufficient to penalize those who truly abuse our system of justice by bringing vexatious and frivolous litigation.

The proposal is a frontal attack designed to end diversity jurisdiction, without repealing 28 U.S.C. § 1331. It virtually requires those who would otherwise be entitled to bring cases within that jurisdiction to file their claims in state court in order to avoid the vise created by its fee shifting terms. Thus, sub rosa, the legislation creates a situation where the important benefit of being able to come into federal court, one the ABA has long supported, is only available to those for whom the "penalty" exacted by loser pays is something they can afford.

The proposal gives no equivalent choice to defendants who are forced into a loser pays situation by the choice made by the plaintiff. While it is easy to over-generalize and assume all plaintiffs will avoid loser pays at all costs and all defendants will embrace it, in fact many defendants, because of their limited means, will be shocked to learn that in order to have an opportunity to present what they believe to be a meritorious, albeit close-question-defense, must run the risk of paying not only their fees, but the fees of the plaintiff as well.

The proposal will foster legal maneuvering as parties try to become federal "plaintiffs" or "defendants" to take advantage of or avoid the operation of the statute. Defendants sued in state courts will file federal declaratory judgment actions and defendants sued in federal court will file non-removable state court actions. All of which will give rise

to ancillary litigation over whether fees should be shifted and which cases should proceed or be stayed as multiple judges are presented with precisely the same claims.

The proposal will introduce into the settlement process economic leverage unrelated to the merits of the claims. The experience in England demonstrates this point. There cases in which fee-shifting is applicable settle at about one-half the value of cases where it does not apply.

CONCLUSION

The problems with loser-pays legislation were best highlighted by the Federal Courts Study Committee chaired by Judge Joseph F. Weis, Jr. of the Third Circuit Court of Appeals. What that august group concluded bears repeating here:

"Although sometimes advocated, a general rule making losing parties fully liable for the winners' reasonable attorney fees is a radical measure that would be inconsistent with traditional American attitudes toward access to courts. Such a rule would work harshly in close cases, especially when a party advocates a position that is reasonable but is nevertheless unsuccessful. It might excessively discourage parties with plausible but not clearly winning claims, particularly when a prospective party is risk averse - as is likely to be true of middle-class persons who cannot risk a big loss. Furthermore, the rule could actually make settlement less likely: other things being equal, it increases the negotiation gap between the litigants. Even jurisdictions like the United Kingdom that formally follow the loser-pays rule often temper it substantially, as by imposing only partial liability, providing broad public legal aid, or making the rule inapplicable in significant classes of cases."

For all these reasons, we urge the American Bar Association House of Delegates to adopt the annexed resolution.

Respectfully submitted,

David C. Weiner, Chair
Section of Litigation

February 1995

APPENDIX 3.—LETTER DATED FEBRUARY 27, 1995, TO THOMAS E. MOONEY, COUNSEL, SUBCOMMITTEE ON COURTS AND INTELLECTUAL PROPERTY, FROM ARTHUR D. WOLF, PROFESSOR OF LAW, WESTERN NEW ENGLAND COLLEGE SCHOOL OF LAW



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February 27, 1995

Mr. Thomas E. Mooney, Counsel
House Judiciary Subcommittee
on Courts and Intellectual Property
Suite B351A, Rayburn HOB
Washington, D.C. 20515

RE: Section 2 of H.R. 988

Dear Tom:

Enclosed is a letter to Mr. Moorhead regarding Section 2 of H.R. 988. I apologize for the late submission; I started drafting the letter on February 13, when the Subcommittee had not yet set a date for mark-up (as your staff had informed me). I did not realize it would be moving so rapidly to the floor of the House. Would it be possible, Tom, to obtain a copy of H.R. 988 and the accompanying report?

In any event, I would appreciate your including the enclosed letter in the hearing record. If it helps, you or I could change the date of the letter as I have been working on it for the last several weeks. Since Mr. Moorhead introduced H.R. 988 on February 16, any date thereafter would be appropriate. In any event, if it is not possible to enter my letter into the hearing record, please let me know so that I can see if I can get it included in the Congressional Record when the bill comes to the floor for final action.

Apart from H.R. 988, if I may be of any assistance to you and the Subcommittee as you process legislation, please do not hesitate to call. As you know, many of the recommendations of the Federal Courts Study Committee remain undressed, and the Judicial Code has not been comprehensively revised since 1948. I would be pleased to provide any help to you in these and other matters.

I am pleased, Tom, that you are counsel to the Subcommittee. You and Mr. Moorhead have had a longstanding and abiding interest in matters relating to courts and judicial administration that antedates and goes far beyond "The Contract." Perhaps some of these matters can now be moved forward. Please give my regards to Joe. Incidentally, I have lost track of Mr. Railsback. Do you ever see or speak with him? I wish he were still a Member.

Faithfully,

Art

Arthur D. Wolf
Professor of Law



Western New England College
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February 27, 1995

The Honorable Carlos J. Moorhead
Chair, House Judiciary Subcommittee
on Courts and Intellectual Property
Suite B351A, Rayburn HOB
Washington, D.C. 20515

RE: Section 2 of H.R. 988

Dear Mr. Moorhead:

Together with Mary Frances Derfner, I am the co-author of *Court Awarded Attorney Fees* (1994), a three volume treatise that focuses on the award of counsel fees in federal courts. I am writing to express my concerns regarding Section 2 of H.R. 988, the "Attorney Accountability Act of 1995." I would appreciate your including this letter in the hearing record, and would be please to offer whatever information or suggestions you may wish concerning the legislation. Let me make a few preliminary observations here regarding Section 2.

First, Section 2 adopts a modified form of the "English rule" for the award of attorney fees in cases where federal jurisdiction is based on Section 1332 of Title 28 (diversity jurisdiction). Since 1796, courts of the United States have applied the "American rule," in which each party bears the responsibility for its own attorney fees. *See generally* Derfner and Wolf, *Court Awarded Attorney Fees*, ¶ 1.02 (1994). In codifying the English rule, Section 2 would shift the fee-paying obligation to the losing party, plaintiff or defendant. Thus the nonprevailing party would be obligated to pay the attorney fees of all parties to the litigation with respect to each losing claim. In multi-party and multi-claim litigation, the fee award could be very substantial even if the "losing" party prevailed on some but not all of its claims.

On several occasions through the years, the House Judiciary Committee (and your Subcommittee in particular) has rejected, in a variety of contexts, proposals to adopt the English rule. The reason for not adopting the English rule in the past is straightforward. Committee members have feared the adverse impact the rule might have on the presentation of legitimate, though novel, claims. If the English rule had been the law in the federal courts, would Brown have sued the Board of Education of Topeka, Kansas, to remedy racial discrimination in the public schools, or would Baker have brought suit against Carr to correct malapportionment in state legislatures? Similarly such a rule might deter defendants from asserting reasonable, but untested, counterclaims. Fear of fees may also deter other parties (*e.g.*, third party plaintiffs

or defendants) or potential parties (e.g., intervenors) from alleging well grounded, but innovative, claims. If American law is to grow and develop (and not stagnate and calcify), then unnecessary barriers, such as the English rule, should not be erected to prevent the assertion of legitimate claims by any party or potential party.

Second, Section 2 is designed to apply to civil actions brought into the federal courts under Section 1332, the so-called diversity statute. Sponsors of the bill have stated that it applies only to cases between citizens of different states. Section 1332, however, is not limited to such suits. It reaches several other categories of actions, including cases between citizens of the United States and nationals of other countries, and between foreign states themselves and citizens of the United States. Applying the English rule to cases involving citizens or subjects of a foreign state or foreign nations themselves raises serious questions involving international relations, sovereign immunity, and international law. Section 2 should apply, if at all, only to civil actions brought pursuant to Section 1332(a)(1), cases involving "citizens of different States."

Third, while Section 2 covers other categories of civil actions, it applies principally to suits between citizens of different states, so-called "diversity" suits. Since the enactment of the Rules of Decision Act in 1789 (now codified in 28 U.S.C. § 1652), the federal courts have applied state law to diversity claims, a rule the Supreme Court emphatically restated and expanded in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Even before the decision in *Erie*, the Supreme Court applied state attorney fee law to determine which party, if any, should recover its fees in diversity litigation. E.g., *Fidelity Mutual Life Ass'n v. Mettler*, 185 U.S. 308 (1902); *Sioux County v. National Sur. Co.*, 276 U.S. 238 (1928). The same rule has obtained after *Erie* in the federal courts. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 n.31 (1975); see generally Derfner and Wolf, *Court Awarded Attorney Fees*, ¶¶ 1.02[2][a][iii], 4.03[4], and 14.02[2] (1994). State law of counsel fees applies because recovery of fees is integrally related to the claim on the merits, and because differing state and federal rules regarding recovery of attorney fees would inevitably lead to forum shopping between the state and federal tribunals.

As drafted, Section 2 does not accommodate in any regard the state law of attorney fees. It simply establishes a federal rule which, if constitutional, would override and displace all applicable state law whether consistent or inconsistent with Section 2. The displacement of state law raises the question whether Section 2 is constitutionally permissible. If the award of attorney fees is integrally related to the state claims in diversity cases, as the award is under Section 2, then Congress may not displace state attorney fee law. The Supreme Court in the *Erie* case held that neither Congress nor the federal courts may apply federal substantive rules to state based claims in diversity cases. Recent federal precedents have applied that principle to attorney fee petitions in federal diversity suits. "In diversity cases, we apply state rules covering the award of attorneys' fees." *Security Mutual Life Ins. Co. v. Contemporary Real Estate Associates*, 979 F.2d 329, 331-32 (3d Cir. 1992). Accord: *Montgomery Ward & Co. v. Pacific Indem. Co.*, 557 F.2d 51, 56 n.8 (3d Cir. 1977) ("in diversity suits, *Erie's* teachings apply to govern the award of attorney's fees").

Furthermore, not all federal rules are inapplicable to diversity suits. In *Erie* and subsequent cases, the Supreme Court has emphasized the need to determine whether the federal rule sought to be applied determines the outcome of the litigation. In other words would the application of federal law encourage forum shopping between federal and state courts? In short would the federal rule substantially affect the litigants' choice of a state or federal forum? If Section 2 were enacted, it would clearly impact the parties' choice of forum. A diverse plaintiff confident of victory would choose the federal court so that she could recover her attorney fees if state law would not so provide. On the other hand, if state law did not provide for a fee recovery and the plaintiff thought her claim was less certain, she would choose the state forum. However, the defendant might then remove the case to federal court to take advantage of Section 2 fee awards. In either case, the federal statute would significantly affect the parties' selection of the forum. *Erie* and its progeny underscore the impermissibility of federal law that, if applied to diversity cases, would significantly affect the litigants' choice of state or federal court and thus result in the "inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965)(footnote omitted).

The decision in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), is not to the contrary. In that case, the Supreme Court permitted federal trial courts to apply federal law in a diversity suit to award attorney fees to deter and punish misconduct that occurred during the litigation process. In *Chambers*, unlike Section 2, the fee award did not depend on the vitality of a claim, and was not related to it. "[T]he imposition of sanctions under the bad-faith exception [to the American rule] depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation." *Id.* at 53. In contrast, under Section 2, the viability of a claim is the only factor that determines a party's eligibility for a fee award. In diversity cases, fee awards that are tied to state based claims have historically been and are constitutionally required to be determined by state, not federal, law.

Fourth, the foregoing discussion raises the additional question whether Section 2 would apply to diversity cases removed by a defendant from state to federal court under Section 1441 of Title 28. As drafted, Section 2 does not apply to such cases because its express terms include only cases "commenced" under Section 1332. Removed diversity cases under Section 1441 would be outside the scope of Section 2. There is no apparent reason why the bill treats diversity cases removed from state to federal court under Section 1441 differently from diversity cases commenced originally in the federal court under Section 1332. Perhaps the drafters of Section 2 inadvertently omitted removed cases from its coverage; such an omission may easily be corrected by express language. If, however, Section 2 is intended to cover removed cases and may be so interpreted as currently drafted, then its impact on forum shopping is even more dramatic than if it applies only to diversity suits initially commenced in the federal court.

Fifth, Section 2 compels the federal court to award attorney fees to the prevailing party in each diversity case. The nondiscretionary nature of the authority is unusual under federal statutes. The vast majority of federal fee-shifting statutes gives the judge some measure of discretion in allowing fee awards. A substantial number of fee provisions that this Committee has processed are of that nature. For example, through the years, the Judiciary Committee has

reported, with bipartisan support, many civil rights statutes that contain attorney fee provisions. In each instance, the statute gives the court the discretion, carefully circumscribed to be sure, to award attorney fees.

In addition, these and other statutes recognize that plaintiffs bring civil actions generally to vindicate the majesty of state or federal law and to advance important public policies. They are wrapped essentially in the mantle of the public interest. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). Defendants, on the other hand, are not in court in the same posture. Thus this Committee and the courts have recognized the very different roles that plaintiffs and defendants play in our legal system, and have accordingly adjusted attorney fee awards: prevailing plaintiffs are generally treated more favorably than prevailing defendants. *Id.* For example, this Committee has long recognized that victorious antitrust plaintiffs should recover their attorney fees. 15 U.S.C. §§ 15 and 26 (1994). In sharp contrast, this Committee has not authorized any fee awards for prevailing defendants in private antitrust cases. When small businesses, for example, sue large corporations that seek to monopolize trade or commerce in violation of the Sherman Act, how fair or equitable would it be to make such plaintiffs pay the attorney fees of the huge and prosperous defendant should it prevail? Section 2 ignores this fundamental and long recognized distinction based on the posture of litigants in state and federal court litigation. Contrary to years of federal practice, it treats plaintiffs and defendants equally in the award of attorney fees.

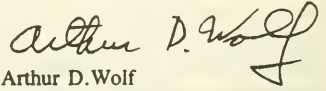
Sixth, Section 2 is not clear on its treatment of indigent parties, especially penurious or impecunious plaintiffs. Part of the section could be read as authorizing fees even if the losing party is unable to afford them. Another part might allow the judge to excuse payment of the fees where the court finds "special circumstances" that would make a fee award "unjust or inequitable." Section 2 should be modified to make clear that judges should not award fees against persons, individual or corporate, who cannot afford to pay them.

Seventh, Section 2 seems more designed to keep diversity cases out of the federal courts than as a neutral attorney fee provision. If the goal of the section is to discourage the commencement of suits based on Section 1332, the means chosen to advance that goal are misplaced. Using an attorney fee bill to achieve that aim is ineffective and in any event distorts attorney fee policy. As a member of the Federal Courts Study Committee, you may recall the sections in its report of April 2, 1990, that were quite critical of federal court diversity jurisdiction. The report recommended various measures to reduce the number of diversity cases in the federal courts. Implementing the English rule in federal diversity cases, however, was not among its many recommendations to curtail the diversity jurisdiction. If Section 2 means to restrict that jurisdiction, it would be more prudent to adopt the recommendations of the Federal Courts Study Committee, and not seek to do so indirectly by distorting longstanding federal attorney fee policy. In 1990, your Subcommittee sought to contract the diversity jurisdiction directly by processing legislation that restricted the use of supplemental jurisdiction in diversity suits. See 28 U.S.C. § 1367(b) (1994).

In conclusion, Section 2 is, in my judgment, unconstitutional. Since it ties awards of attorney fees to the merits of the plaintiff's claims (and perhaps the claims or counterclaims of other parties), the section infringes the concept of federalism and the role of state law in federal diversity litigation that are embodied in the Rules of Decision Act, 28 U.S.C. § 1652 (1994), and the *Erie* case and its progeny. Even if constitutionally valid, Section 2 has numerous flaws that should be corrected before it becomes public law. In its current state, the section is inconsistent with longstanding federal attorney fee policy and practice, and should be abandoned or significantly revised to reflect more accurately the principles that undergird existing attorney fee statutes, many of which are the legislative product of the Judiciary Committee.

Thank you, Mr. Chairman.

Faithfully,

A handwritten signature in cursive script, reading "Arthur D. Wolf". The signature is written in dark ink and is positioned above the printed name and title.

Arthur D. Wolf
Professor of Law

ADW:app

APPENDIX 4.—STATEMENT OF STUART Z. GROSSMAN, CHAIR, CIVIL JUSTICE COMMITTEE, AMERICAN BOARD OF TRIAL ADVOCATES

It is something astonishing what authority is accorded to the intervention of a court of justice by the general opinion of mankind. That power is so great that it clings even to judicial formalities when the substance is no longer there: it gives body to a shadow.

Alexis de Tocqueville
Democracy in America

INTRODUCTION

On January 4, 1995, Members of the House of Representatives introduced HR 10, a bill to reform the federal civil justice system and product liability law. That bill, titled the "Common Sense Legal Reforms Act of 1995", contains some of the most sweeping and drastic changes ever introduced into Congress to abridge the rights of the Seventh Amendment, alter the federal civil justice system and violate the separate sphere of sovereignty reserved to the States.

It is the position of the American Board of Trial Advocates that the provisions of this bill are short-sighted and ill-advised, at best, and should not be passed.

The American Board of Trial Advocates is a national organization whose members include 4,200 trial lawyers consisting of approximately 50% defense lawyers and 50% plaintiff's lawyers. The primary purpose of the American Board of Trial Advocates is the preservation of the Seventh Amendment right to a civil trial by jury. The organization is dedicated to promoting the fair and efficient administration of justice for the benefit of individual litigants and the general public.

This Position paper will address the first five sections of Title I of the "Common Sense Legal Reforms Act of 1995".

I. SECTION 101. AWARD OF ATTORNEY'S FEE TO PREVAILING PARTY
IN FEDERAL CIVIL DIVERSITY LITIGATION

A. BACKGROUND

Section 101 would amend Title 28 of the United States Code to add a provision requiring that a United States District Court award a reasonable attorney's fee to a prevailing party in a diversity action. It caps the amount which can be awarded to the prevailing party at either the cost incurred by the non-prevailing party for attorneys' fees or, for a contingency fee arrangement, at a "reasonable cost." It gives the court discretion to refuse to award a fee or to reduce the amount of a fee awarded on a finding of "special circumstances that make an award of an attorney's fee . . . unjust."

B. COMPARISON WITH TRUE "ENGLISH RULE"

One of the most compelling findings regarding this proposed legislation is the dissimilar impact it will have in the United States in comparison to England where the loser pays rule, as we know it, originated. In England, the Legal Aid Society pays attorneys' fees for all of its citizens whose yearly income is \$45,000 or less. In the United States, the number of persons who would qualify for such attorney's fee assistance would be approximately 72.8 % of the population (based on figures for household income of up to \$50,000). In addition, English citizens who do not qualify for Legal Aid Society assistance can qualify for other legal aid in appropriate circumstances. Thus, in England, in most instances, the effect of the rule is not to factor into an individual's decision of whether to bring suit the additional risk of paying an opponent's attorney's fee.

C. THE RULE SWEEPS FAR BEYOND ITS INTENDED SCOPE

The proponents of this legislation suggest that one purpose of the rule is to eradicate frivolous litigation. However, not only is that purpose served by the current language of Rule 11 of the Rules of Civil Procedure¹, but by subjecting all claims to this rule, the crucial distinction between a frivolous claim and a reasonable, but unsuccessful, claim is lost. The deterrence of claims which have no basis in fact or law is a valid goal. However, as one opponent to this rule has said, "This country should never find itself in the position of suggesting that the courts are only open for disputes where the result is certain. It is just in those situations where either the facts and/or the law present close questions that the courts provide an extraordinary service to our citizens for resolving their disputes."² (Emphasis added).

D. THE RULE WILL DESTROY FEDERAL DIVERSITY JURISDICTION

Article III of the United States Constitution guarantees diversity jurisdiction:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . . The judicial Power shall extend to all Cases . . . between Citizens of different states; . . .

U.S. Const. Art. III.³ In espousing on the right of access, the United States Supreme Court stated that the Fourteenth Amendment, like the Fifth Amendment,

in declaring that no State "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitration spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no greater burdens should be laid upon others in the same calling and condition

Barbier v. Connolly, 113 U.S. 27, 29 (1885)(emphasis added). Alexis de Tocqueville explained that "[w]hen two individuals belonging to different states go to law, one could not without inconvenience have the matter judged by the other party's state. It is safer to choose a tribunal not suspect of partiality to either party, and the natural tribunal to select is that of the Union."⁴

The effect and design of this loser pays provision is to destroy this constitutionally-guaranteed diversity jurisdiction. By imposing what may be a substantial cost for an unsuccessful claim, this provision virtually forces a litigant to elect to take his or her matter to a state court.

E. THIS PROVISION WILL UNDERMINE ACCESS TO THE FEDERAL COURTS BY EVISCERATING THE CONTINGENT FEE ARRANGEMENT

This provision undermines access to the federal courts by the middle class and the poor. All of the advantages provided by the time-honored availability of lawyers who will take matters on a contingent fee basis are jettisoned by the fact that the client who can only afford to hire a lawyer on a contingent fee basis, if he or she were to lose, would be responsible for the fees of the opponent. Even for those who would be able to proceed on a non-contingent fee basis, the fact that the individual or small company might be liable not just for their lawyer's fee, but for double those fees, means that the access to the courthouse would be reduced.

Further, it is likely that defendants with more financial assets available to pay attorneys' fees (such as defendants covered by liability insurance), will invariably not settle a case where the facts or law are questionable because increasing the defendant's legal expenses through trial and appeal to the court of last resort will impose an ever-increasing burden of loss upon a plaintiff who is less financially able to pay a defendant's legal fees. Thus, the settlement of actions will be discouraged.

F. THE RULE WOULD FALL HARSHLY ON THOSE WHO LITIGATE TO VINDICATE PUBLIC RIGHTS AND ESTABLISH PRINCIPLES

The proposed rule would fall harshly upon those who bring or defend litigation to vindicate rights and establish important principles. Entities who bring such litigation have difficulty obtaining lawyers and finding the necessary funding for legal services. If, in pressing such litigation in the future they were forced to face the penalty of this loser pays rule, much, if not all, of this important law-shaping litigation would not be brought in the federal courts. For those defending cases in federal court, such as individuals or owners of small businesses, the cost of defense could be devastating. Defendants who wish to defend on principle or to vindicate public policy would also be financially precluded by this rule.

G. THE PROVISION LEAVES TOO MUCH OPEN FOR INTERPRETATION

Most notably, the proposed legislation mandates that a court award attorneys' fees to the prevailing party, yet gives the court discretion to refuse to award a fee or to reduce the amount of a fee awarded on a finding of "special circumstances that make an award of an attorney's fee . . . unjust." The provision does not begin to define what may constitute "special circumstances" or to what extent the imposition of attorneys' fees on the losing party may be "unjust". This leaves the statute wide open for differing interpretations of what may constitute "special circumstances" or an "unjust" imposition of fees and leaves the statute open for a disparate treatment of certain classes of parties or subject matter.

Further, the statute does not define a "prevailing party". In cases where there is more than one party on one or both sides of an action, a party who prevails against one defendant yet does not prevail against another, may be subject to having a successful award reduced as a penalty for not knowing the identity of the responsible party was prior to the initiation of the litigation.

Further, due to the vagueness of the proposed legislation, it is not clear who a "prevailing party" is if a case settles. A party who is faced with having to pay the opponent's attorneys' fees will be discouraged from settling his or her case.

H. CONCLUSION

In sum, the purpose of this proposed legislation -- the deterrence of frivolous litigation -- is served by the current language of Rule 11 of the Federal Rules of Civil Procedure. What additional "frivolous" litigation the proposed rule would serve to deter is greatly outweighed by the effect which the proposed rule would have on destroying diversity jurisdiction, closing access to the federal courts for all cases except those where the result is certain, undermining access to the federal courts by eviscerating the contingent fee arrangement, and undermining access to the federal courts by the poor, middle class and especially those who bring litigation to vindicate rights and establish important principles. Finally, the most meritorious cases filed in federal court under the loser pay rule could potentially expose defendants to devastating losses which they should not be required to bear. The proposed rule should not be passed.

- II. RULES CHANGES: SECTIONS 102 AND 104: "HONESTY IN EVIDENCE" AND "ATTORNEY ACCOUNTABILITY"
- A. PASSAGE OF SECTIONS 102 AND 104 OF H.R. 10 WOULD CIRCUMVENT THE RULES ENABLING ACT (28 U.S.C. §§ 2072-2074)

The procedure for the promulgation of rules that govern practice and procedure in federal courts is set forth in Section 2072 to 2074 of Title 28 of the United States Code. Section 2072 provides:

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

28 U.S.C.A. § 2072 (1988)(emphasis added). The method for prescribing rules of evidence and procedure is set forth in Section 2073 which authorizes the Judicial Conference to prescribe and publish such procedures. 28 U.S.C.A. § 2073 (1988). The final step in the rule-making process is the submission of a rule of evidence or procedure to Congress for consideration and approval. 28 U.S.C.A. § 2074 (1988).

This time-proven process proceeds from separation of power concerns and is driven by the practical recognition that, among other things:

- * Rules of evidence and procedure are inherently matters of intimate concern to the judiciary, which must apply them on a daily basis;
- * Each rule forms just one part of a complicated, interlocking whole, rendering due deliberation and public comment essential -- else the impact of any rule may be quite different in quality or force than that which was intended; and
- * The Judicial Conference is in a unique position to draft rules with care in a setting isolated from pressures that may interfere with painstaking consideration and due deliberation.

Sections 102 and 104 of H.R. 10 are not an outgrowth of a rule proposed pursuant to the Rules Enabling Act. Instead, the introduction of these Sections in the manner in which they have been proposed constitutes a drastic departure from the statutorily-authorized procedure for the amendment and promulgation of the Rules of Evidence.

B. PROPOSED CHANGES TO RULE 702

1. INTRODUCTION

Rule 702 of the Federal Rules of Evidence currently states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Section 102 of HR 10 would amend Rule 702 to read as follows:

(a) In general, if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(b) Adequate basis for opinion. Testimony in the form of an opinion by a witness that is based on scientific knowledge shall be inadmissible in evidence unless the court determines that such opinion is

(1) based on scientifically valid reasoning; and

(2) sufficiently reliable so that the probative value of such evidence outweighs the dangers specified in Rule 403.

(c) Disqualification. Testimony by a witness who is qualified as described in subsection (a) is inadmissible in evidence if such witness is entitled to receive any compensation contingent on the legal disposition of any claim with respect to which such testimony is offered."

2. HISTORY OF RULE 702

With the introduction of Section 102 of H.R. 10, the House seeks to summarily reverse over twenty-one years of judicial practice and thirteen years of work in devising, drafting, studying, and promulgating the Federal Rules of Evidence.

Section 702 was passed by Congress as part of H.R. 5463 in 1974 after "almost thirteen years of study by distinguished judges, Members of Congress, lawyers and others interested in and affected by the administration of justice in the Federal courts." S. Rep. No. 1277, 93rd Cong., (1974). H.R. 5463 began in 1961 when the Judicial Conference of the United States authorized then Chief Justice Earl Warren "to appoint an advisory committee to study the advisability and feasibility of uniform rules of evidence for use in the Federal courts." Id.

After drafting and circulating its preliminary report for a year for consideration and suggestions by the bench and bar, the Judicial Conference approved the report "and recommended the appointment of an Advisory Committee on Rules of Evidence to prepare uniform rules of evidence for adoption and promulgation by the Supreme Court of the United States." Id.

After four years of drafting by a distinguished Advisory Committee composed of judges, lawyers and teachers, the Judicial Conference circulated the preliminary draft of proposed rules of evidence. Id. The Judicial Conference reviewed the many suggestions, comments, and proposals, and approved a revised draft in October of 1970 which was then submitted to the Supreme Court for approval. Id.

The Supreme Court returned the draft to the Conference for further publication, circulation, and comment. Id. After further circulation, the Advisory Committee of the Judicial

Conference and the Standing Committee on Rules of Practice and Procedure forwarded a final draft to the Supreme Court in October of 1971. Id.

The Supreme Court promulgated the Federal Rules of Evidence on November 20, 1972, pursuant to various enabling acts. Id. In February of 1973, Chief Justice Warren Burger forwarded the proposed rules to Congress. Id.

Shortly after receipt of the proposed rules, the Subcommittee on Criminal Justice held hearings and took testimony "on the desirability of a uniform code of evidence and the merits of each individual rule." Id. After holding six days of hearings, hearing twenty-eight witnesses, receiving numerous written communications, and developing a hearing record of approximately 600 pages, the Subcommittee began its markup sessions and developed a revised Committee Print. Id. The Print was approved by the Subcommittee and reported to the full Judiciary Committee for its consideration in October of 1973. Id. The full committee debated H.R. 5463, amended it, and ordered it favorably reported. Id. The bill was approved by the full committee and subsequently passed by the House on February 6, 1974.

3. DISTINCTION BETWEEN "VALIDITY" AND "RELIABILITY" OF SCIENTIFIC EVIDENCE

Section 102 would add a new subdivision (b) to Rule 702 of the Federal Rules of Evidence with the avowed intention of codifying the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993). In reality, however, this proposed rule neither codifies *Daubert* accurately nor confines itself to codification.

First, the proposed Rule 702(b) distinguishes between "validity" and "reliability" of scientific evidence -- a distinction expressly disavowed by the Supreme Court in *Daubert* -- and fails to define either term. In *Daubert*, the Court stated:

We note that scientists typically distinguish between "validity" (does the principle support what it purports to show?) and "reliability" (does application of the principle produce consistent results?). . . . Although "the difference between accuracy, validity, and reliability may be such that each is distinct from the other by no more than a hen's kick," . . . our reference here is to *evidentiary* reliability -- that is, trustworthiness. Cf., e.g., Advisory Committee's Notes on Fed. Rule Evid. 602 ("[T]he rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact" is a 'most pervasive manifestation' of the common law insistence upon 'the most reliable sources of information.'" (citation omitted)); Advisory Committee's Notes on Art. VIII of the Rules of Evidence) In a case involving scientific evidence, *evidentiary* reliability will be based upon *scientific* validity.⁵ (Emphasis added).

Second, the proposal reverses the Rule 403 balance which *Daubert* expressly applies to Rule 702 testimony. *Daubert* at 2794. Rule 403 permits the exclusion of relevant evidence "if its probative value is *substantially outweighed by the danger* of unfair prejudice, confusion of the issues, or misleading the jury". (Emphasis added). Proposed Rule 702(b), in contrast, requires that the proffered opinion be "sufficiently reliable so that the *probative value* of such evidence *outweighs the dangers* specified in Rule 403." (Emphasis added).

Third, proposed Rule 702(b) is expressly limited in scope to scientific evidence, while existing Rule 702(b) also applies to "technical, or other specialized knowledge." This scope limitation has two important implications: (a) by operation of traditional rules of statutory interpretation, it reflects a conscious decision to bar extension of *Daubert* to other types of expert opinion testimony -- something *Daubert* expressly does not do; and (b) the result is that the reverse Rule 403 balancing test applies only to scientific opinion and not to other expert opinion testimony (which remains subject to the existing Rule 403 test). Among the problems this generates: opinion testimony is often not easily categorized as purely "scientific" (as opposed to being at least partially "technical" or "other" in character). Nor is there any apparent reason to apply different Rule 403 balancing tests to different types of opinions.

In sum, if Congress believes that codification of *Daubert* warrants further study and analysis, it should expressly commend the issue to the Judicial Conference for prompt attention.

4. THE PROPOSED REVISIONS TO RULE 702 WOULD BE AT ODDS WITH THE "LIBERAL THRUST" OF THE FEDERAL RULES

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786, 2794 (1993), the Supreme Court rejected the application of the "general acceptance" test proposed in H.R. 10.⁶ The Court specifically stated that "a rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to 'opinion' testimony.'" See also, *Beech Aircraft Corporation v. Rainey*, 109 S.Ct. 439, 450 (1988).

The Court reasoned that the Rules themselves place limits "on the admissibility of purportedly scientific evidence" and that the Rules require the trial judge to "ensure that any and all scientific testimony or evidence is not only relevant, but reliable." *Daubert* at 2795. Further, the Court stated that "[t]he Rules were designed to depend primarily upon lawyer-adversaries and sensible triers of fact to evaluate conflicts.'" *Daubert* at 2794 (quoting Weinstein, Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended, 138 F.R.D. 631, (1991)).

C. BAR ON CONTINGENCY FEE FOR EXPERT WITNESSES

Section 102 of H.R. 10 would also add a new evidence Rule 702(c) barring testimony from expert witnesses entitled to receive any compensation contingent on the outcome of any claim with respect to which their testimony is offered. Contingent fee expert testimony is, however, already barred by DR 7-109(c) of the ABA Model Code of Professional Responsibility and, in most jurisdictions (where the practice is prohibited by law), by Rule 3.4(b) of the ABA

Model Rules of Professional Conduct. In those few courts in which this practice is permitted, it can be -- and doubtless is -- the subject of cross-examination.⁷ There is no warrant for Congressional usurpation of the judicial rulemaking prerogative, particularly in the absence of any urgent need or pressing problem in this area.

Moreover, purely as a drafting matter, it is unclear how this proposed provision is to be reconciled -- particularly in *pro bono* cases -- with more than 2,000 existing fee-shifting statutes, many of which provide for expert witness fees. The Judicial Conference is, among other things, currently considering the entire issue of which ethical rules should govern in the federal district courts -- a study that directly raises the contingent-fee testimony issue. The Judicial Conference should consider the issue in the first instance as a matter of both legal ethics and of evidence.

D. SECTION 104. ATTORNEY ACCOUNTABILITY

1. RULE 11 AMENDMENT

In 1983, Rule 11 was amended to require the imposition of sanctions for the filing of any litigation paper that was not well-founded in fact or law. Mandatory sanctions failed because courts became bogged down with their processing and administration. More than 7,000 sanctions decisions were reported under the 1983 version of Rule 11. Federal Judicial Center empirical studies demonstrated that this only represented a small portion of the mandatory sanctions.

The problems with the 1983 version of Rule 11 were many. First, judges lacked discretion to decide which violations were serious and in need of discipline, and which were marginal or trivial. Consequently, judicial resources were wasted when federal judges were required to engage in extended analysis to decide inconsequential issues.

Second, mandatory sanctions clogged the courts in other ways: they interfered with settlement because parties could not withdraw pending sanctions motions. Even if a case was near conclusion, the trial judge, once a sanction issue surfaced, was required to resolve that issue. This was a further waste of precious judicial resources.

Finally, the failure of mandatory sanctions was most embarrassingly illustrated in those cases in which the district penalized lawyers for asserting purportedly frivolous positions -- only to be reversed on appeal and have those positions vindicated on the merits.

Section 104(b) of the H.R. 10 would reverse the 1994 amendment to Rule 11. It would eliminate discretion and would stimulate even more activity than under the 1983 version. This restoration of the status quo ante would ignore all experience under the 1983 version of Rule 11, exacerbates its worst features, and resuscitate and accelerate the enormous amount of judicial time and attention devoted to nonsubstantive motion practice. It should not be enacted into law.

The Rules Enabling Act demonstrated the wisdom of committing the rules of evidence and procedure to the rulemaking process. The flaws of the proposed rules in H.R. give silent testimony to the soundness of that process. Both the "Honesty in Evidence" and the Rule 11 changes should be referred to that process. However, if Congress chooses to circumvent its established practice in those two areas, for the aforementioned reasons, neither provision should be enacted.

2. "SENSE OF CONGRESS" RESOLUTION

Section 104 of H.R. 10 is a "sense of Congress" resolution that each state should pass a law requiring all attorneys hired on a contingent fee basis to disclose in writing both their actual services and the precise number of hours spent performing such services.

Although it is not drafted as a pre-emption of State law, it is "Big Brother" legislation worthy of an overly-intrusive Congress in local matters which should be left to the States to regulate. Section 104 is an unwarranted interference with the contractual rights and responsibilities of clients and their lawyers.

Further, it is ironic and unfair to the men and women of middle class America that this provision is being considered at a time when corporate America is weaning its lawyers away from an hourly-basis system to a result-oriented system where hours and services performed give way to bottom-line considerations. More and more corporate clients look not to hours but only to results. It would be paradoxical that as corporate America moves away from hours, injured America moves toward hourly fees which have proved to be a less than satisfactory system for establishing the proper fee for legal services performed.

Finally, all states already regulate all lawyers' fees, including contingent fees, to the extent they deem them appropriate and necessary. These regulations are the result of years of study and change and should not be altered by a "sense of Congress."

III. SECTION 103. PRODUCT LIABILITY REFORM

A. THE ARGUMENTS RELIED UPON BY THE PROPONENTS OF SECTION 103 OF H.R. 10 TO JUSTIFY THE ADOPTION OF THIS DRASTIC AND FAR-REACHING BILL ARE UNTRUE AND UNSUPPORTED BY THE EVIDENCE

In pushing for the adoption of Section 103 of H.R. 10, the proponents have relied upon a number of arguments.⁸ These arguments, however, are untrue and unsupported by the evidence. Accordingly, there is no proper basis or necessity for the adoption of Section 103. As the Chairman of the Senate Committee on Commerce, Science, and Transportation stated with respect to H.R. 10's predecessor, S.687:

Enactment of S.687 would amount to legislation which dramatically revises our current legal system without any serious factual predicate for such a change.⁹

1. THERE HAS NOT BEEN AN "EXPLOSION" OF PRODUCT LIABILITY LITIGATION IN THIS COUNTRY

One allegation the proponents of Section 103 rely upon in urging its passage is the myth that there has been an "explosion" of product liability litigation in this country. This is simply not true.

The number of product liability cases filed in this country is low, both at the state and federal levels. As the Conference of Chief Justices has properly recognized:

In 1991, roughly 10% of the 7 million civil filings in State general jurisdiction courts were tort cases (700,000). . . . **Only about 4% of the new tort filings in State general jurisdiction courts were product liability cases (only about 28,000 cases in 1991).** . . . **Product liability cases decided at trial comprise less than 3% of all torts reaching trial.** Between 1986 and 1992, new non-auto tort filings (e.g. product liability, medical malpractice, defamation) remained relatively constant, falling and rising only moderately over that period, and ending in 1992 at a level just slightly above the 1986 level . . .¹⁰ (Emphasis added).

Moreover, product liability cases (excluding asbestos cases) filed in the federal courts between 1985 and 1991 actually declined by approximately almost 36 percent (from 8,268 cases in 1985 to 5,263 cases in 1991).¹¹

As Professor Marc Galanter, the Director of the University of Wisconsin Law School's Institute For Legal Studies, has accurately reported:

The decrease in product liability filings was even more dramatic for the largest corporations. A study of the litigation of the nation's one thousand largest corporations, presently being conducted by the Business Disputing Group at the University of Wisconsin in conjunction with the Rand Corporation's Institute for Civil Justice, found that the number of non-asbestos product liability cases involving these corporations fell from **4,014** in 1985 to **1,437** in 1990 -- a decrease of 64%.¹² (Emphasis added).

The only true "litigation explosion" has not been an explosion of product liability cases, but rather an "explosion" in the number of **lawsuits between corporations**. As noted by Milo Geyelin in *The Wall Street Journal*¹³:

Business may be their own worst enemies when it comes to the so-called litigation explosion.

Preliminary data in the first-ever study of litigation patterns of Fortune 1000 companies show that **businesses' contract disputes with each other constitute the largest single category of lawsuits filed in federal court**. Trailing behind are personal-injury suits and product-liability cases brought by individuals.

This result -- while limited to federal courts -- seems to challenge companies' frequent claims that personal-injury plaintiffs' lawyers are the main engines of litigation in America. And it may force some companies to review their own penchant for using the courts to resolve commercial disputes. (Emphasis added).

As stated by Columnist Colman McCarthy, in *The Washington Post*¹⁴:

On the issue of "clogging the courts" The Administrative Office of the U.S. Courts found that between March 1990 and March 1992, product liability cases declined from 18,639 to 10,919. A 1988 University of Wisconsin law review article stated that from 1971 to 1986, **cases of corporations suing other corporations rose more than 1,100 percent**. . . . (Emphasis added).

2. PRODUCT LIABILITY LITIGATION HAS NOT CAUSED A LIABILITY INSURANCE CRISIS IN THIS COUNTRY

Proponents of Section 103 of H.R. 10 suggest that product liability litigation has caused a liability insurance crisis, and is responsible for escalating insurance costs. This is simply not true:

- * Liability insurance premiums (excluding automobile liability premiums), have actually decreased since the mid-1980's.¹⁵
- * Insurance premiums for most American businesses account for less than one percent of a business's gross receipts, and do not threaten business viability.¹⁶
- * The American Insurance Association, in testimony concerning a predecessor to Section 103 of H.R. 10 with substantially similar provisions, stated that "the bill is likely to have little or no beneficial impact on the frequency or severity of product liability claims . . . and it is not likely to reduce insurance claims or improve the insurance market".¹⁷

If there ever was an "insurance crisis," it was clearly a manufactured crisis resulting largely from the insurance industry's short-sighted practices -- and not from the filing of product liability cases. See, e.g., "The Manufactured Crisis: Liability-Insurance Companies Have Created A Crisis and Dumped it on You," *Consumer Reports* (August 1986).

Indeed, bad investment strategies by insurance companies and the high interest rates of the idle 1970's and early 1980'S (not jury awards of product liability cases) were the cause of skyrocketing premiums and policy cancellations in the 1980's.¹⁸

3. THERE HAS NOT BEEN AN EXPLOSION OF EXCESSIVE COMPENSATORY AND PUNITIVE DAMAGE AWARDS IN PRODUCT LIABILITY CASES

The proponents of Section 103 of H.R. 10 argue that there has been an "explosion in the frequency, size, and availability of punitive damage awards" and that federal legislation is necessary to correct this "problem." These allegations are, once again, simply untrue:

- * Punitive damages are very rarely awarded in product liability cases.¹⁹
- * The number of known punitive damage awards in non-asbestos product liability cases from the early 1980's to 1990 actually decreased 34 percent.²⁰
- * In the rare case where punitive damages are awarded, they are typically modest. The median punitive damage award between 1981 and 1986 in jurisdictions studied by the American Bar Foundation was only \$30,000.²¹
- * Despite the fact that consumer products (excluding cigarettes) are responsible for an estimated 29,000 deaths and 3 million injuries each year, punitive damages were awarded in only 353 product liability cases -- between 1965 and 1990, and 91 of these involved asbestos claims. Approximately 25 percent of these awards were reversed or remanded upon appeal.²²
- * The overwhelming majority of plaintiffs who received punitive damages suffered catastrophic injury or death.²³
- * Three out of four product liability punitive damage awards involved the failure of a company to warn of well-known dangers, or the failure to remedy known and serious dangers after marketing or regulatory approval.²⁴
- * The circumstances under which punitive damages may be awarded are already highly restricted by the States. According to the Conferences of State Justices:

Thirty-nine states either do not permit punitive damage awards or have taken steps to reduce the frequency and size of the punitive awards through state-level tort reform. Following *Haslip* (111 S.Ct. 1032 (1991)), even some of the remaining states have tightened their standards.²⁵
- * Justice Scalia of the United States Supreme Court recently acknowledged in *TCO Production Corp v. Alliance Resource Corp.*, 113 S. Ct. 2711, 2727 (1993) that:

State legislatures and courts have ample authority to eliminate any perceived "unfairness" in the common-law punitive damages regime, and have frequently exercised that authority in recent years.
- * Punitive damages are not responsible for any claimed "crisis" in the availability and affordability of insurance.²⁶

The proponents also suggest that the amount of money awarded to persons injured by "defective products, or to the families of those killed by such products, is "excessive". This is also untrue:

- * For the 10-year period ending December 31, 1991, the average payment to victims of defective products in all cases closed by insurance companies (including verdicts, settlements, and those closed with no payment) was \$3,767; for those closed with payments the average was \$8,577.²⁷
- * A very extensive study of verdicts in product liability cases which was conducted by the U.S. General Accounting Office concluded that compensatory awards are neither excessive nor erratic. The size of the awards rendered generally correlated to the severity of the injury suffered and the amount of actual economic loss sustained.²⁸

4. THE NATIONALIZATION OF PRODUCT LIABILITY LAW IS NOT NECESSARY TO PROVIDE UNIFORMITY AND PREDICTABILITY IN TORT LITIGATION

Proponents of Section 103 of H.R. 10 suggest that the nationalization of product liability law is necessary to provide uniformity and predictability to product liability litigation. This argument, however, completely ignores the fact that the same liability standard (*i.e.*, "strict liability") is already in effect in almost all of the States.²⁹

Moreover, predictability will be reduced rather than increased. Each of the fifty States will have to decide the scope of Section 103 of H.R. 10's pre-emption and how it interacts with that State's nonpre-empted tort law. Indeed, the interaction between federal and state law in the tort area will be made much more complex. The well-settled case law to which businesses can now look to predict how a particular case is likely to be resolved will become unsettled. As noted by the Chief Justice of the Supreme Court of Arizona, on behalf of the Conference of Chief Justices:

If the primary goal of this legislation is to provide consistency and uniformity in tort litigation, we are concerned that its effect will be the opposite. **Preempting each State's a existing tort law in favor of broad federal product liability law,**

will create additional complexities and unpredictability for tort litigation in both State and Federal courts, while depriving victims of defective products of carefully reasoned principles and procedures already developed at the State level. The critical experience of State courts with the long process of interpretation and consistency on major points of product liability law, tells us that Federal legislation is not the answer. Re-inventing tort law must occur by and through State courts and legislatures situated to determine and control the impact of reform within their own communities.³⁰ (Emphasis added).

If the search is for a single settled law, the goal will not be achieved through federal legislation. Section 103 of H.R. 10 would pre-empt State law and substitute federal standards, with novel and untested terms and concepts. The new standards of Section 103 of H.R. 10 would be imposed in a single overlay upon the 50 existing State court systems as well as the federal courts.

The federal standards will be applied in many different contexts and inevitably will be interpreted and implemented differently, not only by the state courts, but also by the Federal courts.

5. THE PRESENT PRODUCT LIABILITY SYSTEM IN THIS COUNTRY DOES NOT "CHILL" NEW PRODUCT INNOVATION

Proponents of Section 103 of H.R. 10 have suggested that the threat of litigation and resulting damage awards under our present product liability system has "chilled" or stifled the development of useful and innovative products.

As the Association of Trial Lawyers of America pointed out:

No proof has been offered to support a claim that the liability system has a chilling effect on the development of otherwise desirable and safe products. Proponents of (S.687) offer only anecdotal evidence that, if anything, in fact demonstrates the value of the tort system. For example, proponents of the bill testified that the threat of product liability lawsuits caused Monsanto's decision not offer a new "safe" substitute for asbestos. However, both the EPA and the medical community concluded that this "safe" substitute was a potential carcinogen every bit as dangerous as asbestos. Monsanto, in fact, may have faced lawsuits if it had marketed the product. If the current product liability

system "stifles" the development and marketing of potentially deadly products, this should be applauded, not criticized.

The current product liability system provides an innovation incentive for companies to develop safe products. **Profitable business innovation is only enhanced by a legal system that offers consumers safer products.**³¹

6. THE PRESENT PRODUCT LIABILITY SYSTEM IN THIS COUNTRY DOES NOT HARM THE COMPETITIVENESS OF AMERICAN BUSINESS

Proponents of Section 103 of H.R. 10 also argue that the American product liability system and litigation costs put American business at a disadvantage when competing with foreign companies. This is another myth which is simply untrue.

As a representative of The National Conference of State Legislatures recognized:

It cannot be seriously suggested that foreign competitors understand our 50 state laws better than our own domestic manufacturers Japanese and other foreign manufacturers are subject to suit for product defects in state courts just as surely as American manufacturers are. On the other hand the existence of a national uniform standard in Japan has done little to insure that our manufacturers take advantage of their market.³²

The hard evidence simply does not support the unfounded allegations of the proponents:

- * Important studies of the competitiveness of U.S. business do not indicate that our product liability system harms the competitiveness of American firms.³³
- * When a foreign company sells a defective product which injures or kills persons in the United States, that company is subject to the same product liability laws as an American company doing business here.³⁴
- * All companies are subject to the liability laws of the county or jurisdiction in which their product is sold and causes injury or death.³⁵
- * Foreign companies do not escape compensating workers and consumers who are injured or killed using their products in jurisdiction outside the United States.³⁶
- * The costs associated with our state tort system may actually be substantially less than the higher taxes and the cost of regulations imposed by other countries upon business.³⁷

- * In many countries businesses face substantially greater government safety regulations which result in compliance costs at least as great as any imposed by the American tort system.³⁸

Perhaps even more importantly, the current American product liability system provides a real incentive for the production of safe products -- products which are more competitive than unsafe acid dangerous products. As Professor Mark Hager of American University has stated:

[O]ur [American] products, because of their superior reputation for safety, due in part to the effects of product liability over the last 20 years, have a superior reputation in the international marketplace. . . . We cannot compete at this time with the low labor costs of newly industrializing countries, but we can compete very effectively . . . in safety, and it would be a grave risk to our international competitiveness to toy with the tort system that helps bring about that competitive advantage.³⁹ (Emphasis added).

B. THE ADOPTION OF SECTION 103 OF H.R. 10 WOULD CLEARLY BE CONTRARY TO THE PUBLIC INTEREST AND A DISSERVICE TO THE AMERICAN PEOPLE.

The adoption of Section 103 of H.R. 10 would be contrary to the public interest and a disservice to the American people -- particularly those unfortunate enough to be injured by a defective and dangerous product.

1. SECTION 103 OF H.R. 10 IS UNFAIR SPECIAL INTEREST LEGISLATION AT ITS WORST

Section 103 of H.R. 10 should be called the "Unfair Special Interest Act", or the "Tortfeasor Protection Act" for that is exactly what it is. The only interests who will be served by the bill are special interests -- those of companies manufacturing and selling dangerous products which injure and kill Americans.

The public interest would clearly not be served by the passage of Section 103 of H.R.

10. To use the language of one leading consumer advocate:

Under the guise of blatant falsehoods, supporters of S.640 [the predecessor of both S.687 and Section 3 of H.R.10] would downgrade the rights of injured consumers throughout the country to receive fair compensation for injuries caused

by dangerous products. This would erode deterrence by significantly reducing the financial incentive for manufacturers to product safe products. **The tragic result would be more injuries, more uncompensated victims, and greater overall casts to society.**⁴⁰ (Emphasis added).

The bill's provisions would essentially scuttle the important public policy which has been the foundation of product liability law in this country for more than 50 years. As Judge Roger Traynor properly noted in *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436 (Cal. 1944) at page 462:

[A] manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings. . . . Even if there is no negligence . . . public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture or the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection. (Emphasis added).

Section 103 of H.R. 10 effectively dismantles this important public policy:

2. SECTION 103 OF H.R. 10 WOULD ELIMINATE JOINT AND SEVERAL LIABILITY

Section 103 of H.R. 10 would eliminate joint and several liability for "noneconomic" damages (e.g., pain and suffering). It would shift the risk that defendants will be insolvent from the manufacturers responsible for the defective product to the injured victims.

Section 103 rests on a fundamental misunderstanding of the concept of joint liability. Only a tortfeasor -- a person or company whose misconduct has caused harm -- can be held liable, either jointly or sometimes severally.⁴¹

Section 103 also rests on faulty assumptions about the lack of the seriousness or the devastating consequences of "noneconomic loss".⁴² Many noneconomic injuries, such as loss of the ability to have children, are among the most terrible injuries that people can suffer.⁴³

C. SECTION 103 OF H.R. 10 WOULD PROTECT MANUFACTURERS OF UNSAFE PRODUCTS

Section 103 would provide an absolute shield from punitive damages for manufacturers of government-approved drugs, medical devices or aircraft unless the injured party can prove fraud.⁴⁴ This bill would make government approval (which often represents a very minimum standard of safety) a license to recklessly market an unsafe or defective product.⁴⁵

Section 103 would also impose a much higher burden of proof for obtaining punitive damages, making it extremely difficult, and in some cases impossible to recover punitive damages from manufacturers who recklessly market unsafe products.

D. SECTION 103 OF H.R. 10 WOULD LIMIT COMPENSATION

Section 103 would absolutely bar any compensation to workers injured by defective workplace products more than 25 years old. This bar would apply even to workplace products designed to last more than 25 years and regardless of the danger of the product or the strength of the victim's case. Section 103 fails to recognize that some American companies still use machines over 25 years old, and persons are sometimes injured by them.⁴⁶

E. SECTION 103 OF H.R. 10 IMPOSES NON-UNIFORM SELECTIVE PRE-EMPTION

While Section 103 of H.R. 10 is touted as a move toward a "more uniform system of product liability law through federal preemption of state law", it would not impose a uniform law. It revises the law only in the states that currently have a products liability law which provides for adequate compensation to injured Americans. The bill, however, "would leave the state law intact if that state law currently favors defendants". See Report 103-203, Report of the Senate Committee on Commerce, Science, and Transportation on S.687 (November 20, 1993), at pg. 80-81.

1. SECTION 103 OF H.R. 10 WOULD RESULT IN THE DENIAL OF JUSTICE TO MILLIONS OF INJURED AMERICANS AND THEIR FAMILIES

Our system of government was established to safeguard the rights of the people and to render justice. Indeed, James Madison once wrote that "justice is the end (purpose) of government".⁴⁷

The adoption of Section 103 of H.R. 10 would be more than unfair; it would be manifestly unjust. The unnecessary restrictions and limitations it would impose would ultimately result in the denial of justice to millions of injured Americans and their families:

* More than 3 million Americans are injured each year by consumer products.⁴⁸

* Consumer products kill more than 29,000 Americans every year.⁴⁹

NOTE: If cigarettes and smoking materials are included in the definition of harmful defective products, the death toll of Americans from consumer products is more than 430,000 per year.⁵⁰

* Based on past experience it is clear even one dangerous defective product can expose millions of Americans to injury and death. For example:

More than 2.2 million Dalkon Shields (a defective and unsafe intrauterine contraceptive device) were inserted into women in the United States between 1970 and 1975.⁵¹

More than 10 million Americans have been exposed to the dangers of asbestos, which can cause serious illness and death.⁵²

If adopted, the draconian features of Section 103 designed to provide protection to those who manufacture, sell and distribute dangerous defective products at the expense of injured Americans would undoubtedly result in massive injustice. As the Legislative Director for Consumers Union, the Publisher of *Consumer Reports*, stated:

Under the present liability system, consumers already face formidable obstacles preventing justifiable recoveries. . . .

Many victims of dangerous products do not pursue their product liability claims against the manufacturers for a number of reasons, including lack of education about the civil justice system, lack of appreciation that litigation is an avenue for redress, or lack of understanding of the procedures for filing disputes.

Others are deterred because they are reluctant to expose themselves and their families both to a privacy eradicating court proceeding and the stresses and time commitment of an adversary process. The most frequent action accident victims take in response to their injuries is to do nothing.

This legislation would only add to the considerable burdens faced by injured consumers and workers when they pursue their remedies through product liability lawsuits. The bill should be rejected.⁵³

2. SECTION 103 OF H.R. 10 WOULD EFFECTIVELY DESTROY AN IMPORTANT LEGAL SAFEGUARD WHICH SERVES TO DETER THE MANUFACTURE AND SALE OF DANGEROUS DEFECTIVE PRODUCTS IN THIS COUNTRY

The most terrible aspect of Section 103 is that it would effectively destroy an important legal safeguard which serves to deter the manufacture defective products in this county.

By making it much more difficult if not impossible under certain circumstances, to obtain punitive damages, Section 103 of H.R. 10 virtually destroys that sanction which plays an

important role in preventing misconduct by product manufacturers. As the widower of the victim of a defective heart valve put it:

"The award of punitive damages in those cases where manufacturers act unscrupulously has the effect of deterring other manufacturers from engaging in similar misconduct."⁵⁴ (Emphasis added).

Studies have demonstrated that the present American product liability system promotes product safety and discourages unsafe products.⁵⁵ The incentive for the manufacture of safe products should not be destroyed.

3. SECTION 103 OF H.R. 10 WOULD PROTECT AND PROVIDE A WINDFALL TO THE MANUFACTURERS OF PRODUCTS WHICH KILL OR SERIOUSLY INJURE AMERICANS

By gutting major elements of the American product liability system and effectively destroying a safeguard which deters the manufacture and distribution of defective products, Section 103 rewards the wrong people.⁵⁶ Rather than helping to assure that Americans who are injured or killed by defective products are fully compensated, the bill does just the opposite: it actually rewards companies who disregard safety in pursuit of the almighty dollar -- and who put corporate greed above public responsibility.⁵⁷

The record of American manufacturers during the past 20 years in the production of safe products has generally been good. However, the Senate should recognize that, in the past, a small minority of American companies has sometimes disregarded public health and safety in the manufacture and marketing of their products.⁵⁸ For example, in a case involving the Dalkon Shield, a defective intrauterine contraceptive device, the Supreme Court of Minnesota concluded:

The injuries sustained by women using the Dalkon Shield were sometimes severe and disabling . . . the (manufacturer) evidenced a disregard for the health and safety of women using the Dalkon Shield by continuing to market the product after serious defects were discovered.⁵⁹ (Emphasis added).

This kind of conduct should not be rewarded, but that is exactly what Section 103 of H.R. 10 would do.

4. SECTION 103 OF H.R. 10 WOULD VIOLATE THE PRINCIPLES OF AMERICAN FEDERALISM AND RESPECT FOR STATE SOVEREIGNTY UPON WHICH OUR SYSTEM OF GOVERNMENT IS BASED

Since the founding of our nation, tort law has properly been within the province of the States. The unprecedented imposition by Congress of a flawed national product liability act would nationalize the state tort system.

This drastic action, despite the objections of the States,⁶⁰ would be destructive of the States' important role in developing and administering laws and rules for the redress and compensation for victims who are injured or killed in their jurisdictions by defective and dangerous products. More importantly, the adoption of Section 103 of H.R. 10 and its pre-emption language would clearly violate the basic principles of American Federalism and comity.

As Justice Lewis F. Powell, Jr., of the United States Supreme Court, properly recognized in *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528, 568, 571-572 (1985):

In our federal system, the States have a major role that cannot be pre-empted by the National Government. As contemporaneous writings and the debates at the ratifying conventions make clear, the States' ratification of the Constitution was predicated on this understanding of federalism. Indeed, the Tenth Amendment was adopted specifically to ensure that the important role promised the States by the proponents of the Constitution was realized. . . .

The Framers believed that the separate sphere of sovereignty reserved to the States would ensure that the States would serve as an effective "counterpoise" to the power of the Federal Government. . . .

By usurping functions traditionally performed by the States, federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties. (Emphasis added).

Justice Hugo L. Black put it another way in *Younger v. Harris*, 401 U.S. 37, 44 (1971).

He said:

The notion of "comity" that is, a proper respect for state functions, is a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that **The National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.** This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. . . . What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments and in which the **National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.** (Emphasis added).

The adoption of Section 103 of H.R. 10 would constitute an "overreaching under the Commerce Clause" and would have destructive results:

- * It would summarily "overturn" and pre-empt product liability laws which were developed through many years of practical experience;
- * It would discard the extensive tort law reforms which the various States, in response to their own individual needs and circumstances, have already carefully enacted;
- * It would create a constitutional conflict between the States and the Federal Government, and;
- * It would undermine the constitutionally mandated balance of power between the States and the Federal Government.

5. THE ADOPTION OF SECTION 103 OF H.R. 10 WOULD SET A DANGEROUS PRECEDENT FOR THE EFFECTIVE "DISMANTLING" OF OUR FEDERAL SYSTEM THROUGH INVASION AND EROSION OF THE STATES' SOVEREIGNTY

Not only does Section 103 of H.R. 10 violate the principles of American Federalism, but its passage would set a dangerous precedent for the effective dismantling of our system of dual sovereignty. This would be unfortunate, for as the State Assembly of the National Conference of State Legislatures has recognized:

Within the system of dual sovereignty, states serve not only as a bulwark of freedom but also, and perhaps more importantly, as a framework for adapting to change. A Justice Brandeis wrote, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel, social, and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)(Brandeis, J., dissenting).⁶¹

Indeed, as the Conference of State Justices accurately stated:

The consequences of S.687 for federalism are incalculable. With the proposed legislation reaching so far into substantive civil law, States will be forced to provide the judicial structure but will not be permitted to decide the social and economic questions in the law which their courts administer. Enactment of S.687 would alter in one stroke, the fundamental federalism inherent in this country's tort law.⁶² (Emphasis added).

6. SECTION 103 OF H.R. 10 WOULD DISRUPT OUR COUNTRY'S STATE COMMON LAW SYSTEM AND CAUSE CHAOS AND ADDITIONAL LITIGATION IN THE COURTS

The enactment of Section 103 would substantially disrupt our country's state common law system and actually cause chaos and additional litigation in both state and federal courts.

The Honorable Harry L. Carrico, Chief Justice of the Supreme Court of Virginia, testifying in 1987 on behalf of The Conference of Chief Justices, observed:

We do not believe it is possible for Congress to preempt one area of the tort law of the states without creating new complexities for the federal system and unsettling the whole body of state tort law.⁶³ (Emphasis added).

As Professor Marshall S. Shapo noted in testimony on behalf of the American Bar Association concerning similar legislation:

[A] proposal of this sort, besides seriously dampening the creativity of state courts, would actually complicate the law, viewed as a systems rather than simplify it. For many years, people have been complaining about the workload of the Supreme Court, and complaints about the burdens of the federal courts generally have escalated over the last decade or so. It would seem that legislation of this sort can only deposit more reams of litigation on the desks of federal, as well as state, judges. Why would this Committee want to involve our nation's courts in a new set of wrangles about the meaning, let alone the constitutionality, of a federal statute that attempts to change a quite serviceable body of state law?⁶⁴ (Emphasis added).

Indeed, as lawyers knowledgeable about the operation of our state and federal court system have recognized:

Instead of creating order, this measure [S.687] would create chaos in the courts, because all 50 state court systems would interpret its provisions differently.⁶⁵

7. SECTION 103 OF H.R. 10 IS UNCONSTITUTIONAL

Aside from its other drastic defects, Section 103 is also unconstitutional. There is no basis for its adoption, since it is based upon false premises.⁶⁶ It clearly would not result in "a uniform product liability law".⁶⁷

The bill would, however, result in an unprecedented abridgement of the States' sovereignty and an improper and unconstitutional overreaching under the Commerce Clause in violation of the Tenth Amendment to the Constitution of the United States.⁶⁸ The overreaching would be extremely harmful.⁶⁹

We submit that if there was ever a situation where the Supreme Court of the United States would conclude that a purported exercise of Congress' power to regulate interstate Commerce was improper and would abridge the Tenth Amendment, Section 103 of H.R. 10

presents that situation.⁷⁰ As Chief Justice Marshall stated in *McCulloch v. Maryland*, 17 U.S. 316, 423 (4 Wheat)(1819):

Should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the (national) government it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.

The challenge to federalism posed by the unprecedented scope of Section 103 would clearly be subject to review under Article III of the Constitution. As William Van Alstyne, a constitutional law expert and professor of law at Duke University, has recognized:

[A]rticle III emphasized that the judicial power would extend to all cases "arising under this Constitution," including most prominently federalism cases. the point being by this means to keep the Congress "within the limits assigned to their authority," and not allow it to presume to the regulation of things not committed to its discretion. Indeed, this was declared as the most important judicial task.⁷¹ (Emphasis added).

8. SECTION 103 OF H.R. 10 DOES NOTHING TO AID THE VICTIMS OF DEFECTIVE PRODUCTS

This bill does absolutely nothing to help the victims of defective products, and actually places more roadblocks in the path of victims who seek to recover just compensation for their injuries. A representative of the Consumers Union properly noted:

Daily news reports about serious injuries resulting from such products as silicone breast implants, asbestos, all-terrain vehicles, and heart devices remind us that the marketplace can be treacherous. **Product victims need more protection, rather than legislation which would make it even harder to recover for injuries caused by dangerous products.**

American consumers seeking compensation through the civil justice system are facing enormous obstacles. During the past decade, the majority of states have passed laws greatly reducing the potential for consumers to prevail in court. Still, for millions of Americans without adequate health insurance, the courthouse may be the only place they can turn for compensation in the event of a product related injury.⁷² (Emphasis added).

9. SECTION 103 OF H.R. 10 WOULD HAVE A PARTICULARLY ADVERSE IMPACT UPON AMERICAN WOMEN

The provisions of Section 103 of H.R. 10 would have a particularly adverse impact upon American women. As Professor Lucinda M. Finley⁷³ noted:

Too many of the most tragic and preventable instances of unsafe drugs or devices have involved women's reproductive health: D.E.S., which some have called one of the greatest public health disasters of the 20th century; the Dalkon shield; the Copper-7; Rely Tampons; Accutane; Ritodine⁷⁴; breast implants. There may be others predictably looming on the horizon. Many of the widely used infertility drugs. For example, despite warnings from the medical profession for the need for such testing, have not been adequately tested for possible adverse effects on any children conceived while using them, nor have they been tested for any extra health risks they may present to women already hormonally at risk because of their DES exposure, even though DES daughters are one of the largest consuming groups for infertility treatment.

Research has indicated that in several of these instances, manufacturers have been particularly lax about testing or about heeding signs of dangers or issuing warnings because women and women's health are devalued.⁷⁵ (Emphasis added).

F. CONCLUSION

Section 103 of H.R. 10 is an ill-conceived piece of legislation whose adoption would result in a bad law. As properly noted by Senator Hollings:

[H.R. 10's predecessor was] opposed by every major consumer organization, a wide range of health organizations, the American Bar Association, the National Conference of State Legislatures, and the Conference of State Supreme Court Justices. Over 70 law professors from all over the country have written to the Committee in opposition to this bill, stating that it is "unwise, unfair and ill-conceived. . . .

These are the experts in health, consumer protection, and legal jurisprudence. They are concerned not with fees, but with product safety, justice and the proper functioning of the legal system.⁷⁶

The American Board of Trial Advocates respectively urges you to oppose this bill and to recognize, as Edmund Burke properly remarked more than 200 years ago⁷⁷:

"Bad Laws Are The Worst Sort Of Tyranny."

IV. SECTION 105. NOTICE REQUIRED BEFORE COMMENCEMENT OF CIVIL ACTION

A. INTRODUCTION

The proposed provision requires that 30 days before filing any civil action in federal court, the plaintiff must serve the defendant with a written statement specifying the particular claims to be made and the amount of damages to be claimed. If the statement is **not provided**, the defendant may move to dismiss without prejudice within 60 days of such filing.

The requirement is not applicable to any action involving, "exigent circumstances" as well as number of other exceptions such as seizure, bankruptcy, lien foreclosures, actions involving assets likely to be dissipated, defendants likely to flee, and other matters.

The requirement would seem not to apply to removed cases and it explicitly does not apply when the expiration of a statute of limitations is an issue.

B. DISCUSSION

It is thought that the purpose of the Notice provision is to encourage settlement. However, there is no need for a provision of this sort. First, it is a common practice in most jurisdictions that a demand letter or some other advance notice of a threatened lawsuit (if not a draft copy of the proposed complaint) be submitted to the adverse party prior to the filing of the suit. Therefore, the proposed rule would likely not alter the status quo in the overwhelming majority of cases.

Further, the exceptions, to a large extent, eliminate the purpose of the rule. There is a long list of exceptions carved out and one of the exceptions is, "actions involving exigent circumstances". Most parties would consider their situation to involve exigent circumstances and thus would eliminate the applicability of the rule.

Further, the rule would seem not to apply to removed cases and it explicitly does not apply when the expiration of a statute of limitations is an issue.

Because the proposed rule has language such as, "exigent circumstances," it can be anticipated that the proposed rule would foster satellite litigation. This, in turn, would waste precious judicial resources both on a trial and appellate level.

The proponents of Section 105 will argue that such pre-suit notice will save the need to file vast numbers of federal civil suits. It is more likely that the number of suits will not diminish and the number of pre-trial skirmishes will be greatly increased all to the detriment and expense of litigants and the courts. It will create a new nightmare for the civil litigation system in this country.

Further, as most lawyers know and routinely practice, if prior notice has even a decent chance of success, notice will be given. Hardly a lawsuit is filed when the filing party has not given the target defendant a chance to "pay up", "change its course of conduct", or "otherwise act" if the plaintiff believes such notice has even a small chance of success. When it does not, there is no need for such notice and the intricacies of Section 105 will only add more burdens to an otherwise overburdened system.

C. CONCLUSION

Because most segments of the Bar, by common practice, currently give notice of some sort, because of the numerous exceptions in the proposed rule, because of the likelihood of satellite litigation, and because the rule has not attained its intended purposes, it is recommended that the proposed 30 day notice period not be adopted.

ENDNOTES

1. Rule 11 states, in relevant part: "The signature of an attorney or party [on every pleading, motion, and other paper of a party] constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . ." Fed.R.Civ.P. 11.
2. Statement of David C. Weiner Before the Subcommittee on Intellectual Property and Judicial Administration of the House Committee on the Judiciary in Relation to the Rule 11 and Loser Pay provisions of H.R. 10, pp. 4-5.
3. 28 U.S.C. § 1332 contains the statutory provisions for diversity jurisdiction. It states, in part:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$50,000, exclusive of interest and costs, and is between --

(1) citizens of different States;

. . . .

4. Alexis de Tocqueville, *Democracy in America*, pp. 144-45.
5. Daubert, at 2795, n. 9.

In *Daubert*, the Supreme Court set forth the guidelines for the admission of scientific testimony:

The primary focus of [the obligation of the trial judge before scientific testimony is admitted] is Rule 702, which clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" an expert "may testify thereto." The subject of an expert's testimony must be "scientific . . . knowledge." The adjective "scientific" implies a grounding in the methods and procedures of science. Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation. The term "applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds. . . .". Of course, it would be unreasonable to conclude that the subject of scientific testimony must be "known" to a certainty; arguably, there are no certainties in science. . . . But, in order to qualify as "scientific

knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation -- i.e., "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.

Id. at 2795 (citations omitted).

6. The relevant "general acceptance" language from Frye is as follows: "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." Frye v. United States, 54 App.D.C. 46, 47 (1923).
7. United States v. Abel, 469 U.S. 45 (1984)(bias impeachment permitted under Federal Rules of Evidence).
8. See, Section titled "There Is No Factual Basis For This Legislation" in Report 103-203, Report of the Senate Committee on Commerce, Science, And Transportation on S.687 (November 20, 1993) at pg. 61-80.
9. Report 103-203, Report of the Senate Committee on Commerce, Science And Transportation On S.687, at p. 80 (November 20, 1993).
10. The Conference of Chief Justices, Statement on S.687. Submitted To The United States Senate Committee on Commerce, Science, And Transportation Consumer Subcommittee (September 23, 1993).
11. Testimony of Marc Gallanter before the United States Senate Committee on the Judiciary, Hearing on S.640, p.3 (August 5, 1992).
12. Id.
13. Milo Geyelin, The Wall Street Journal, December 3, 1993, at B1.
14. Colman McCarthy, The Washington Post, February 16, 1993, at D21.
15. U.S. Department of Commerce, U.S. Industrial Outlook (1992).
16. U.S. General Accounting Office, Liability Insurance-Effects or Recent "Crisis" on Businesses and Other Organizations, GAD/HRD-88-64 (July 1988); National Insurance

Consumer Organization, Product Liability: 1991 Calendar Year Experience, (1992) at p.4.

17. See, Testimony of Deborah Ballen, Vice president, American Insurance Association. Consumer Subcommittee Hearings on S.1400, April 5, 1990. See also, Association of Trial Lawyers of America, "S.687. The Product Liability Fairness Act" Is Unfair And Unnecessary". (1993), at p.1.
18. See, "Insurance Commissioners Blame Liability Crisis on Insurers", Liability Week, (July 6, 1987).
19. Michael Rustad, Demystifying the Functions of Punitive Damages in Products Liability: An Empirical Study of a Quarter Century of Verdicts, Washington: Roscoe Pound Foundation, (1991).
20. Summary of testimony of Marc Galanter, Committee on the Judiciary, United States Senate, Hearing on S.640, at p. 2 (August 5, 1992).
21. The Supreme Court of Kansas found in Tetuan v. A. H. Rolins Co., 738 p.2d 1210. 1245 (Kan. 1987) that the manufacturer of the Dalkon Shield "sold 4.4 million Dalkon Shields in the United States and abroad, costing \$.30 per unit to produce and selling for \$4.35 "; see also, Joint Exhibits 1 and Exhibit 38-L-17 in Office of Disciplinary Counsel v. Philip a. Zanderer, Case No. DD 83-191, Supreme Court of Ohio.
22. Id.
23. Statement of Lucinda M. Finley, Professor of Law, State University of New York at Buffalo School of Law before the Subcommittee On Courts And Administrative Practice Of The Committee On The Judiciary of the United States Senate on S.687, at p. 6 (March 15, 1994).
24. Id. at p. 7. See also, Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L.Rev. 1 (1992); Thomas Koenig and Michael Rustad, *Demystifying Punitive Damages in Product Liability Cases: A Survey of a Quarter Century of Verdicts* (Roscoe Pound Foundation, 1991); S. Daniels and J. Martin, *Myth and Reality in Punitive Damages*, 75 Minn.L.Rev. 1 (1990) (authors are researchers at American Bar Foundation); Peterson, Sharma & Stanley, *Punitive Damages: Empirical Findings* (Rand Institute for Civil Justice, Report R-3311-1CJ).

25. The Conference of Chief Justices, "Statement On S.687 The Product Liability Fairness Act Of 1993", Submitted to the United States Senate Committee On Commerce, Science, Aid Transportation Consumer Subcommittee, at p. 7, n. 6 (September 23, 1993); see also, Koenig, and Rustad, *The Quiet Revolution Revised: An Empirical Study of the Impact of State Tort Reform on Punitive Damages in Products Liability*, 16 Justice System Journal 23 at n. 5.

26. See, "The Manufactured Crisis: Liability Insurance Companies Have Created A Crisis and Dumped it on You," Consumer Reports (August 1986); "Insurance Commissions Blame Liability Crisis On Insurance," Liability Week (July 6, 1978).

27. National Insurance Consumer Organization, First Ever Insurance Data On Product Liability, p. 1 (September 8, 1992).

28. U.S. General Accounting Office, Product Liability: Verdicts and Case Resolution in Fire States, GAO/HRD -89-99 (September 29, 1989).

29. As of 1988, 45 states had adopted the law of strict liability set forth in Section 402(A) of the RESTATEMENT SECOND OF TORTS, including Arizona, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, and Wisconsin. In addition, the "unreasonably dangerous" standard has been accepted in Alabama and Georgia. Specific proof that a product is unreasonably dangerous is not required in Alaska, California, Idaho, New York, Pennsylvania, Washington and West Virginia. See also the Survey of States in L. YRUMER AND M. FRIEDMAN, PRODUCTS LIABILITY 3.03(3) (1987); and AMERICAN LAW OF PRODUCTS LIABILITY THIRD 125-131 (1987).

30. The Conference of Chief Justices, Statement on S.687 The product Liability Fairness Act Of 1993. Submitted to the United States Senate Committee on Commerce, Science, And Transportation Subcommittee, at p. 2 (September 23, 1993).

31. Association of Trial Lawyers of American, The Facts About S.687 (1993) at pg. 3-4; see also, Nathan Weber, Product Liability: The Corporate Response, The Conference Board (1987).

32. Testimony of Representative Michael Box, Alabama House of Representative on behalf of The National Conference of State Legislatures before the Committee on the Judiciary, U.S. Senate, concerning S.1400 The Product Liability Reform Act (July 3, 1990) at p.3.

33. See, Office of Technology Assessment, Making Things Better: Competing in Manufacturing, OTA-ITE-443 (1990); Kenneth Jost, *Tampering with Evidence: The Liability and Competitiveness Myth*, "ABA Journal (April 1992).
34. Kenneth Jost, *Tampering with Evidence: The Liability and Competitiveness Myths*" ABA Journal (April 1992).
35. Id.
36. Werner Pfenningstorf & Donald G. Gifford, A Comparative Study of Liability Law and Compensation Schemes in Ten Countries and the United States, Insurance Research Council (1991).
37. See, "Not Guilty," The Economist (February 13, 1993).
38. Id.
39. Testimony of Professor Mark Hager, Assistant Professor of Law, Washington College of Law, American University, at Consumer Subcommittee Hearings, on S.1400, at p. 126 (April 5, 1990).
40. Statement of Ralph Nader on S.640, "The Product Liability Act of 1991", submitted to the Senate Committee on Commerce, Science and Transportation, p. 13 (September 19, 1991).
41. Joint and several liability helps to assure that a person injured by a defective product receives full compensation from a defendant who acted wrongfully "in a way that in fact caused the injury". See, Statement of Professor Lucinda M. Finley Before the Subcommittee on Courts and Administrative Practice of the Committee on the Judiciary of the United States Senate, March 15, 1994.
42. Congress recognized the importance of allowing recovery for noneconomic damages by enacting the Civil Rights Act of 1991 to allow the recovery of such damages in sexual harassment and employment discrimination cases. See, **H.R. Report No. 104-40**, 102 Congress, 1st Session (1991).
43. As the result of two products, the Dalkon Shield and Copper 7 intrauterine contraceptive devices, women sustained serious internal infections resulting in infertility. See, Tetuan v. A.H. Robins Co., 738 P.2d 1210 (Kan. 1987) Kociemba v. Searle, 707 F. Supp. 1517 (D.Minn.1989); see also, Report 103-203. Report of the Senate Committee on Commerce, Science And Transportation On S.687, p. 78 (November 20, 1993).

44. This "shield" is not only unwise but unnecessary. Only an extremely small percentage of the punitive damage awards awarded in product liability cases have been awarded in cases involving drugs or medical devices. See, Rustad, *In Defense of Punitive Damages*. 78 Iowa L. Rev. 1, 47 (1992).
45. The new "defense" to punitive damages established by S.687 overlooks the fact that the dangers of a medical device may not surface until after FDA approval. See, e.g. U.S. General Accounting Office, "FDA Drug Review Postapproval Risks 1976-1985", GAV/PEMD-90-15, at p. 2 (April 1990). See also, Staff Report, "Earn As You Learn: Shiley Inc.'s Breach of the Honor System and FDA's Failure in Medical Device Regulation," Staff Report No. 26-766, Subcommittee On Oversight and Investigations of the Committee on Energy and Commerce, U.S. House of Representatives (February 1990).
46. See, Report 103-203, Report of the Senate Committee on Commerce, Science, and Transportation On S.687, at p. 85 (November 20, 1993).
47. The Federalist Papers, No. 51 (1788).
48. The Washington Post, October 13, 1992, at D21.
49. Id.
50. See, e.g., Rosenblatt, "How Do Tobacco Executives Live With Themselves". The New York Times Magazine, March 20, 1994, at p. 36 (referring to tobacco as a product that kills more than 420,000 Americans a year-surpassing the combined deaths from homicide, suicide, AIDS, automobile accidents, alcohol and drug abuse). See also, "Should Cigarettes Be Outlawed?", U.S. News & World Report, April 18, 1994 at p.34 which notes that the "total annual number of tobacco-related deaths" is 419,000.
51. The Supreme Court of Kansas found in Tetuan v. A. H. Rolins Co., 738 p.2d 1210, 1245 (Kan. 1987) that the manufacture of the Dalkon Shield "sold 4.4 million Dalkon Shields in the United States and abroad, costing \$.30 per unit to produce and selling for \$4.35." See also, Joint Exhibits 1 and Exhibit 38-L-17 in Office of Disciplinary Counsel v. Philip a. Zanderer, Case No. DD 83-191, Supreme Court of Ohio.
52. Studies show that between eleven million and thirteen million workers have been exposed to asbestos. See, Special Project, *An Analysis of the Legal Social, and Political Issues Raised by Asbestos Litigation*, 36 Vand.L.Rev. 573, 580 (1983).
53. Testimony of Linda Lipsen, Legislative Director, Consumers Union, before the Judiciary Committee on. S.640 (August 5,1992) at p. 6 & 13. S.640 was a predecessor of both S.687 and H.R. 10.

54. See, Statement of the idower of Carol Barbee set forth in the Written Testimony of Linda Lipsen, Id. at p.11.
55. See, Report by Professor Ashford and Stone on the impact of the product liability system on safety and innovations in the chemical industry in The Liability Maze published in 1991 by the Brookings Institution. See also, Hand Corporation, Designing Safer Products: Corporate Responses to Product Liability Law and Regulations, (1983); Nathan Weber, Product Liability: The Corporate Response, the Conference Board (1987).
56. "The doctrine of punitive damages survives because it continues to serve the useful purpose of expressing society's disapproval of intolerable conduct and deterring such conduct where no other remedy would suffice". Mallor and Roberts, *Punitive Damages: Toward a Principled Approach*, 31 Hastings L.J. 639 (1980).
57. As recognized by The Supreme Court of New Jersey in Fisher v. Johns-Manville Corp., 512 A.2d 466, 477 (N.J. 1986):

Without punitive damages a manufacturer who is aware of a dangerous feature of its product but nevertheless knowingly chooses to market it in that condition, willfully concealing from the public information regarding the dangers of the product, would be far better off than an innocent manufacturer who markets a product later discovered to be dangerous--this, because both will be subjected to the same compensatory damages. but the innocent manufacturer, unable to anticipate those damages, will not have incorporated the cost of those damages into the cost of the product. All else being equal, the law should not place the innocent manufacturer in a worse position that of a knowing wrongdoer. Punitive damages tend to meet this need.

* * *

In addition it is questionable how much punishment is effected by compensatory damages alone, which are generally covered by liability insurance.

* * *

58. Courts in this country have found that some companies have engaged in appalling misconduct, which unnecessarily put the lives and safety of many Americans at risk. In one such case, the Fisher v. Johns-Manville Corp. case, supra, the Supreme Court of New Jersey noted at 512 A.2d 476:

It is indeed appalling to us that Johns-Manville had so much information on the hazards to asbestos workers as early as the mid-1930's and that it not only failed to use that information to protect these workers but, more egregiously, that it also attempted to withhold this information from the public.

It is also clear that even though Johns-Manville may have taken some remedial steps decades ago to protect its own employees, it apparently did nothing to warn and protect those who, like plaintiff, were employed by Johns-Manville customers engaged in the manufacture and fabrication of asbestos products.

As a report from the Federal Justice Center, cited in Willing, Trends in Asbestos Litigation (1987) noted at p.x1:

During a period of increasing use, asbestos manufacturers suppressed knowledge about the dangers of exposure to asbestos fibers. the result was a further accumulation of potential cases and a factual foundation for punitive damages. A by-product of suppression or unfavorable information was hat companies failed to improve safety standards and communicate warnings that might have mitigated the dangers

59. *Matter of Discipline of Appert & Pyle*, 315 N.W. 2d 204, 213 (1981).
60. The States are opposed to S.687 and similar legislation, as evidenced by the vocal opposition of the National Association of Attorneys General, the National Conference of State Legislatures, and the Conference of Chief Justices.
61. Testimony of Reps. Michael Box, Alabama House of Representatives, On Behalf of The National Conference of State Legislatures Before the Committee on The Judiciary, U.S. Senate, Concerning S.1400, The Product Liability Reform Act, at p. 3 (July 31, 1990).
62. The Conference of Chief Justices, Statement on S.687, " The Product Liability Fairness Act of 1993 Submitted To The United States Senate Committee on Commerce, Science, And Transportation Consumer Subcommittee" at p. 4 (September 23, 1993).
63. The Association of Trial lawyers of America, Additional Statements on Product Liability (1993), at p.1.
64. Statement of Professor Marshall S. Shapo, Northwestern University School of Law on Behalf of The American Bar Association Before the Committee on the Judiciary, United States Senate, concerning broad federal products liability legislation. at p. 5 (July 31, 1990).

65. ATLA, Major Points Against the Federal Product Liability Bill, Section 4, p.1 (1993).
66. See, Section titled "There is No Factual Basis For this Legislation" in Report 103-203, Report of the Senate Committee on Commerce, Science, and Transportation on S.687, at pp. 61-80 (November 20, 1993).
67. Id. at pp. 80-81.
68. The Tenth Amendment to the Constitution of the United States provides that:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
69. As Justice Powell of the United States Supreme Court properly noted in his dissent in *Garcia v. San Antonio Metropolitan transit Authority*, 469 U.S. 528, 572 (1985):

... the harm to the States that result from federal overreaching under the Commerce Clause is not simply a matter of dollars and cents. *National League of Cities*, 426 U.S., at 846-851. Nor is it a matter of the wisdom or folly of certain policy choices. Cf. ante, at 546. Rather, by usurping functions traditionally performed by the States, federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties.
70. With the recent changes in the make-up of the United States Supreme Court, the Tenth Amendment has gained new viability.
71. Van Alstyne, *Federalism, Congress, the States, and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 Duke Law Journal 769, 774 (November 1987).
72. Testimony of Linda Lipson, Legislative Director, Consumers Union, before the Judiciary Committee on S.640, at p. 3 (August 5, 1992).
73. Statement of Lucinda M. Finlay, Professor of Law, State University of New York at Buffalo School of law before the Subcommittee on Commerce, Consumer Protection And Competitiveness of The Committee On Energy And Commerce Of The United States House Of Representatives On H.R. 1910 - - The Fairness In Product Liability Act, at p. 11 (February 2. 1994).

74. Ritodine is a drug approved by the FDA to prevent premature labor, and it is the most widely prescribed drug for that purpose. A major study published in the New England Journal of Medicine revealed that extensive tests showed the drug to be ineffective, with high risks of serious adverse health effects, and sometimes fatal to women. This study was more thorough and methodologically sound than the inadequate testing on which the FDA based its approval. See G. Kolata, *Drug to Aid Birth is Found Ineffective and Risky*, "N.Y. Times, July 30, 1992 at A1.
75. See, e.g., D. Scully, Men Who Control Women's Health (Houghton Mifflin 1980); G. Correa, The Hidden Malpractice: How American Medicine Mistreats Women (Harper & Row updated ed. 1985); C. Muller, Health Care and Gender (Russell Sage 1990).
76. Report 103-203, Report of the Senate Committee on Commerce, Science And Transportation On S.687 (November 20, 1993) at p.60.
77. Edmund Burke, Speech at Bristol, England 1780. cited in Shrager, The Quotable Lawyer, London (1986).



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